
The Legal Injury Narrative: Personal Injury Litigation and Melodrama

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Submitted in fulfilment of the requirements for the
Degree of Doctor of Philosophy

University of Tasmania
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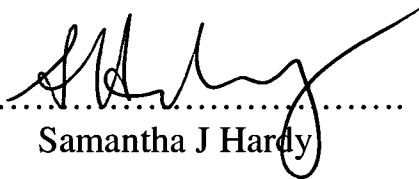
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Statements

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Parts of this thesis were published as an article and a book chapter during my candidature. These publications are listed in Appendix 6.

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ABSTRACT

This thesis attempts to explain why personal injury plaintiffs tend to have poorer health outcomes than non-litigants with similar injuries. It examines the role that injured plaintiffs have to play in the litigation. The thesis develops the concept of the “legal injury narrative” and argues that plaintiffs are required to tell their individual stories in accordance with this master narrative in order to be successful in their claims. The legal injury narrative is analysed through the genre of melodrama. This reveals that the role injured plaintiffs are required to play in the narrative is a passive, mute and dependent one, and this has negative ramifications for their health outcomes. Examining the legal injury narrative in this way also reveals some concerning consequences for society as a whole, particularly the way in which society responds to suffering and how normative assumptions in the law can perpetuate existings power hierarchies and gender stereotypes. Mediation is considered as a possible alternative to litigation. It seems particularly useful as a way of supporting injured people and enabling them to tell their stories according to a tragic genre, which it is argued is more conducive to improved health outcomes. In particular it is argued that mediation, as a future directed procedure, is preferable to the legal injury narrative's current focus on past events and restoring the status quo.

Acknowledgements

This thesis would not have been written without support and encouragement from many people.

I would like to thank both Jerome Bruner and Neal Feigenson for providing me with the original inspiration for this topic and for taking an interest in my work. Neal, in particular, was incredibly generous with his time and encouragement along the way.

My supervisors, Dirk Meure and Margaret Otlowski, were a pleasure to work with. Discussing legal philosophy over a glass of wine from Dirk's vineyard made supervision meetings something to look forward to. Dirk, thank you for your support for even my wildest ideas and your patience in explaining to me the most basic principles of legal theory. Margaret, thank you for your incredibly thorough feedback and unfailingly cheerful nature.

Thank you also to Elle Leane and Anna Johnston for thoughtfully answering my many questions about anything vaguely relating to literature, theatre, or grammar, and for finding time in your busy lives to read over various drafts of parts of this thesis for me.

My colleagues and friends in the Law School have also been supportive in many ways, especially Lisa Butler (who knows more about EndNote and Word than I thought was possible) and Jenny Mora (who kindly waved her magic wand whenever I needed a shower of sparkly spangles).

A very special thank you to my parents, who always knew that I would finish this thesis one day, and who taught me the value of hard work and perseverance.

Finally, much love and thanks to Anna for being there until the end, believing in me, and telling me to "just get on with it" when I most needed to hear it.

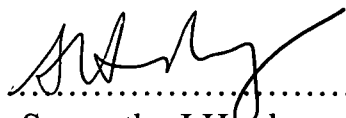
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Introduction

The effect of litigation on injured peoples' recovery has been the subject of debate for many years. In 1961 Henry Miller proposed that litigation was the principal cause of posttraumatic symptoms, largely due to litigants' motivation for compensation.¹ Other studies have shown that litigants will not always improve subsequent to receiving compensation.² A 1996 meta-analysis of 18 studies of the effect of litigation on the healing process for traumatic brain injury patients to some extent supported Miller's findings, suggesting that if litigation was no longer present, almost a quarter of patients would report fewer symptoms.³ A later study of 97 traumatic brain injury patients also found that those who had contacted a lawyer in order to proceed with litigation reported greater anxiety, more overall psychological distress and poorer outcomes than the non-litigant group, although they reported equal levels of physical symptoms.⁴ This study suggested that litigation is 'associated with a degree of symptom amplification, at least on subjective measures of psychological distress and social dysfunction' even at the outset of the litigation process.⁵

In 2001 the Australasian Faculty of Occupational Medicine and the Health Policy Unit of the Royal Australasian College of Physicians released a report entitled *Compensable Injuries and Health Outcomes*.⁶ The report concluded that there was 'good evidence to suggest that people who are injured and claim compensation for that injury have poorer health outcomes than people who suffer similar injuries but are not involved in the compensation process.'⁷ However, the

¹ H Miller, 'Accident Neurosis' [1961] *British Medical Journal* 919.

² H Merskey and J M Woodforde, 'Psychiatric Sequelae of Minor Head Injury' (1972) 95 *Brain* 521-8; R Kelly and B N Smith, 'Posttraumatic Syndrome: Another Myth Discredited' (1981) 74 *Journal Royal Society Medicine* 275-7.

³ L M Binder and M L Rohling, 'Money Matters: A Meta-Analytic Review of the Effects of Financial Incentives on Recovery After Closed-Head Injury' (1996) 153 *American Journal Psychiatry* 7-10.

⁴ A Feinstein et al, 'The Effects of Litigation on Symptom Expression: A Prospective Study Following Mild Traumatic Brain Injury' (2001) 41(2) *Medicine Science Law* 116.

⁵ Ibid 120.

⁶ Australasian Faculty of Occupational Medicine and Health Policy Unit The Royal Australasian College of Physicians, 'Compensable Injuries and Health Outcomes' (The Royal Australasian College of Physicians, 2001).

⁷ Ibid 2.

report also notes that there is very little research to establish why this is so. Some of the suggested, but untested, factors include:

- The adversarial system of managing compensation cases, which encourages both parties to take up fixed opposing positions and creates a climate where getting a result in the court case becomes the goal of both parties, rather than fully rehabilitating the injured person.
- The sense of powerlessness engendered by being caught up in ‘the system’; having no control (except by dropping the claim) over when or how there will be a resolution, no control over decisions made about the claim, no control over number and content of medical examinations, etc.
- The type of compensation offered; systems with no or limited compensation for pain and suffering may produce better outcomes.⁸

In 2005 an Australian study of 135 whiplash patients again found a consistently negative association between the intervention of lawyers and improved health outcomes.⁹

These studies provide the starting point for my exploration of the relationship between personal injury litigation and litigants’ health outcomes. However, this exploration is not based on an analysis of tort law, an examination of civil procedure, or an assessment of the rules of evidence. I do not profess to include a comprehensive review of the legal concepts within the law relating to personal injury or the relationships between them. My work may best be described as one falling within Julius Stone’s classification of sociological (or functional) jurisprudence.¹⁰ I study the interaction between law and society, by observing, interpreting and generalising about the effect of personal injury litigation on injured people and society. My work is a kind of jurisprudence, defined by Stone as ‘the lawyer’s examination of the precepts, ideals and techniques of the law in

⁸ Ibid 4.

⁹ RT Gun et al, ‘Risk Factors for Prolonged Disability after Whiplash Injury: A Prospective Study’ (2005) 30 *Spine* 386. See also O L Osti et al, ‘Potential Risk Factors for Prolonged Recovery Following Whiplash Injury’ (2004) 14 *European Spine Journal* 90; J D Cassidy et al, ‘Effect of Eliminating Compensation for Pain and Suffering on the Outcome of Insurance Claims for Whiplash Injury’ (2000) *New England Journal Medicine* 342: 1179-86.

¹⁰ J Stone, *The Province and Function of Law: Law as Logic, Justice and Social Control - a Study in Jurisprudence* (1946) 30.

the light derived from present knowledge in disciplines other than the law',¹¹ in that I analyse personal injury law from the perspective of literary studies, with particular reference to genre.

My focus is on actions based on the tort of negligence for compensation for physical injury. I collected all the unreported judgments of these kinds of cases from all Australian States and Territories from 1998 to 2000.¹² From these I selected those judgments that dealt with issues of liability and/or quantum, including both trial and appeal decisions. In order to make this volume of cases manageable, I culled those cases involving medical negligence and pure psychological harm. Although the culled cases are also representative and supportive of the points I make in this work, they have added complexities that require discussion beyond the scope of this thesis. In total I reviewed 175 cases from that three year period. I refer mainly to these Australian personal injury judgments as examples, but I occasionally also consider English and American cases.¹³ The systems for claiming compensation for personal injury are similar enough to justify using cases from these jurisdictions, even though the precise requirements of the applicable law may differ in some respects.

Most of the cases I refer to were conducted by a judge sitting without a jury, as this is by far the most common format for such litigation in Australia. However, as jury trials are still possible, although rarely used, in personal injury trials in some Australian jurisdictions, I make occasional reference to juries. I also refer to criminal and international law cases where those cases provide a striking illustration of the points being discussed. This is not to suggest that, because those points can be demonstrated in, for example, a criminal case, they must also exist in a personal injury case. However, it may provide evidence that many of the points being made are equally applicable in different areas of law.

In 2002 the Australian civil litigation system for claiming compensation for personal injury was subject to statutory reforms. However, I do not discuss these reforms in detail for two reasons: firstly, the personal injury cases referred to throughout this thesis were heard prior to the legislation giving effect to the

¹¹ Ibid 25.

¹² Sourced from the Butterworths Australian Unreported Judgments database.

¹³ For consistency in referencing, throughout this thesis I will use the citation style suggested by the Australian Guide to Legal Citation, 2nd Edition.

reforms; and secondly, because the reforms do not significantly impact upon my main arguments.¹⁴

Just as it can be difficult to explain personal injury litigation without referring to cases, it is also awkward to analyse the genre of melodrama without illustrations from melodramatic texts. Accordingly, I refer extensively to melodramatic plays written by French playwright René-Charles Guilbert de Pixérécourt. I have chosen Pixérécourt's plays over other melodramatic playwrights, including English and more modern authors, for a particular reason. Pixérécourt is commonly referred to as the 'father of melodrama' as he, in effect, developed the genre.¹⁵ His plays define the prototype of melodrama, with a strong moral message demonstrated through the actions of clearly virtuous or evil characters cast in the standard roles of heroine, villain, judge and other authority figures.

Injured Peoples' Stories

This thesis began with a series of unstructured interviews with people who had suffered physical injury.¹⁶ Some of these people had been involved in legal actions claiming compensation for their injuries (although not all of them had taken the action to trial) and some had not taken any legal action, either because it was not available to them or they simply chose, for various reasons, not to become involved in the legal system. The interviewees were self-selected, responding to advertisements placed around university campuses in Brisbane, Queensland and Hobart, Tasmania. The advertisements stated that research was being conducted about people who had suffered injuries, and invited people who had suffered an injury in the past few years to volunteer to be interviewed. At the interview, the interviewer informed the subjects that they should tell their story about what happened in their own words. Subjects were not interrupted or questioned while they told their story. When subjects had finished telling their story, they were asked only one question, whether or not they had seen a lawyer about their injury.¹⁷

¹⁴ A summary of the reforms and how they relate to the matters discussed in this thesis is provided in Appendix 5.

¹⁵ J P Marcoux, *Guilbert De Pixérécourt: French Melodrama in the Early Nineteenth Century*, Studies in French Theatre (1992) 1.

¹⁶ Undertaken with approval from the Human Research Ethics Committee of the University of Tasmania.

¹⁷ These interviews were recorded with the permission of the subject and then transcribed.

Reading over the transcripts of these interviews, it became apparent that those people who had seen a lawyer about their injury ('the litigants') and those who had not ('the non-litigants') told their stories differently. The litigants' stories generally fitted the genre of melodrama, in that the injured person was cast as the suffering underdog who was unfairly injured and then had to fight the bad injurer in order to receive compensation for their injuries. In contrast, the non-litigants' stories tended more towards the genre of tragedy, in that the injured person acknowledged that something bad had happened to them, but they had somehow learned from the experience and had been able to move on.

Although these interviews were not numerous¹⁸ or consistent enough to form the basis of an empirical study of the health outcomes of litigants and non-litigants, they did give rise to three questions that I attempt to answer:

1. Is there something about the personal injury litigation system that encourages litigants to tell their stories in a melodramatic way?
2. If so, can this perhaps explain the fact that litigants tend to have poorer health outcomes than non-litigants?
3. Can litigants be encouraged to tell their stories in a different way that may improve their health outcomes?

Overview

The first part of this thesis provides the background to the work in the subsequent chapters. Chapter One classifies previous work on legal storytelling and narrative into three broad approaches. The relationship between law, narrative and genre is then explored, providing a broad jurisprudential context for this work. Finally, the chapter reviews three examples of scholarship on melodrama and tragedy in the specific context of personal injury litigation. I argue that the legal injury narrative fits the genre of melodrama, and accordingly, before this argument can be fully developed, it is necessary to consider the characteristics of melodrama as a genre. This can be found in Chapter Two, which includes a definition of melodrama, a summary of a number of melodramatic plays that are referred to as examples in later chapters, a detailed consideration of melodrama's

¹⁸ In total fifteen people were interviewed.

typical roles and characters, and a discussion about melodrama's role in society. It also compares melodrama with another classic literary genre, that of tragedy.

The second part of this thesis identifies and develops more particular parallels between melodrama and the legal injury narrative and the consequences of this relationship for both the injured person and society as a whole. Chapter Three shows how the legal injury narrative reflects particular characteristics of the melodramatic genre, such as plot structure, character types and moral imperatives. Chapter Four focuses on the melodramatic attribution of blame in the legal injury narrative and how it affects the way in which society responds to accidental injury. I argue that the legal injury narrative masks the inadequacy of tort law to deal with the broad causes of, and society's response to, suffering.

Chapter Five considers the attributes of the defendant role and how they affect the different types of people who might be cast in that role. It explains how the melodramatic notion of blame is inherently linked to norms of behaviour expected of potential defendants. I suggest that the legal injury narrative provides an appearance of justice that hides underlying inadequacies and unfairness in the standards by which defendants are judged.

In Chapter Six the role of the plaintiff in the legal injury narrative is considered in detail. The feminine characteristics of the role are examined, particularly passivity, dependence and muteness. The consequences of a particular injured person failing to comply with the requirements of the plaintiff role, or going too far in an attempt to comply with the role, are also discussed. I also consider how the plaintiff role affects injured men, women and immigrants differently, and propose some reasons for, and consequences of, this difference. The chapter concludes by considering the broader social implications of the fact that injured people are required to comply with the melodramatic plaintiff role.

The recognition of virtue is the subject of Chapter Seven. This chapter reverses the usual focus of tort law on the behaviour of the defendant, and considers the relevance of the behaviour of the plaintiff to the legal injury narrative. It explores the attributes of virtue of male, female and immigrant plaintiffs, and argues that the legal injury narrative is based primarily on the notion of normality as physical wholeness. It also defines normality based on masculocentric and

western capitalist society's ideals. This results in certain harms being unrecognised, while others are simply assumed. The chapter concludes by discussing what happens when a non-virtuous character is cast in the plaintiff role.

Proof and reward in the legal injury narrative are considered in Chapter Eight. The role of the judge is examined, particularly the judicial method of decision making. I suggest that the mechanisms of proof in the legal injury narrative reinforce the plaintiff's passivity and dependence. I also argue that the portrayal of masculine characters as the holders of knowledge and authority embeds traditional gender relations and devalues the feminine injured plaintiff.

Finally, in Chapter Nine, I summarise how the previous chapters address some of the main aims of this thesis. I make recommendations for further enquiry and suggest some alternatives to the legal injury narrative. I argue that the genre of tragedy provides a way of telling an injured person's story that may not impact so negatively on health outcomes. I examine the use of mediation as a method of encouraging the injured person to construct his or her own tragic narrative of injury.

Chapter 1

Background

[Legal storytelling] takes place on a field of pain and death.
Robert Cover¹

Introduction

Foucault's proposal that narrative structures shape the way we think and are part of the larger discourse forming the world in which we live² was echoed by Jerome Bruner, when he said that human beings are predisposed to the production of narratives as a way of making sense of the world.³ These narratives are produced in many different contexts, including in the law.

As legal scholarship has moved away from legal positivism and objectivism, law has been influenced by the 'complex interpenetration and cross-fertilization from the mainstream to the legal culture and vice-versa'.⁴ Robert Cover and James Boyd White of the Law and Literature movement, are credited with first introducing the use of narrative theory into the legal arena.⁵ Since then there have been law and narrative symposia⁶ and many journal articles and books about law and narrative.

This chapter locates my work within existing law and narrative scholarship. The first part distinguishes between studies of storytelling in the law and the broader concept of legal narratives. It also introduces some of the effects that certain types of narratives can have on law and society. The second part of this chapter outlines three categories of narrative scholarship. Following this, the relationship between law, literature and genre is explored. Finally, the chapter reviews the

¹ 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601.

² See discussion in R R French, 'Of Narrative in Law and Anthropology' (1996) 302 *Law and Society Review* 417, at 420.

³ J Bruner, *Acts of Meaning* (1990) 45.

⁴ R K Sherwin, 'The Narrative Construction of Legal Reality' (1994) 183 *Vermont Law Review* 681, at 688.

⁵ R R French, 'Of Narrative in Law and Anthropology' (1996) 302 *Law and Society Review* 417, at 421.

⁶ Symposium, *Legal Storytelling*, 87 *Mich L Rev* 2073 (1989); *Pedagogy of Narrative: A Symposium*, (1990) 40 *Journal Legal Education* 1.

work of three scholars who have studied the relationship between law and melodrama, and law and tragedy.

1.1 Storytelling in the Law and Legal Narratives

In existing law and narrative scholarship, many key terms have not been clearly defined. For example, many scholars use the terms 'story' and 'narrative' interchangeably. Baron and Epstein note that there is, in fact, a difference.⁷ They define 'story' to mean 'an account of an event or set of events that unfolds over time and whose beginning, middle, and end are intended to resolve (or question the possibility of resolving) the problem set in motion at the start'.⁸

Jane Baron points out that the notion that 'storytelling is ubiquitous in the law' is now universally acknowledged,⁹ and many authors have studied storytelling in the law from a variety of perspectives. Some have written about the stories constructed by jurors in order to make sense of the evidence they are presented with at trial and to enable them to decide on a verdict.¹⁰ Others have considered the stories told by clients in their lawyers' offices¹¹ and those told by unrepresented litigants in court.¹² More recently the way in which attorneys structure the story of their clients' cases in opening and closing arguments has been the subject of attention.¹³

However, the broader concept of 'narrative' is also ubiquitous in the law. Gerwitz goes as far as to say that narrative, in a sense, constitutes law.¹⁴ 'Narrative' is defined by Baron and Epstein as 'a broader enterprise that encompasses the recounting (production) and receiving (reception) of stories...[which] organize[s] certain kinds of problems into a form that renders

⁷ J B Baron and J Epstein, 'Is Law Narrative?' (1994) 45 *Buffalo Law Review* 141.

⁸ Ibid 147.

⁹ J Baron, 'The Many Promises of Storytelling in Law' (1991) 231 *Rutgers Law Journal* 79, at 79.

¹⁰ For example N Pennington and R Hastie, 'A Cognitive Theory of Juror Decision Making: The Story Model' (1991) 13 *Cardozo Law Review* 519; W L Bennett and M S Feldman, *Reconstructing Reality in the Courtroom* (1981).

¹¹ For example A Sarat and W L F Felstiner, 'Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction' (1988) 224 *Law and Society Review* 737.

¹² For example W M O'Barr and J M Conley, 'Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives' (1985) 194 *Law and Society Review* 661.

¹³ For example N R Feigenson, 'Legal Meaning in the Age of Images: Accidents as Melodrama' (1999/2000) 43 *New York Law School Law Review* 741; P N Meyer, 'Making the Narrative Move: Observations Based Upon Reading Gerry Spence's Closing Argument in the Estate of Karen Silkwood V. Kerr-Mcgee Inc.' (2002) 9 *Clinical Law Review* 229.

¹⁴ P Gerwitz, 'Narrative and Rhetoric in the Law' in P Brooks and P Gerwitz (eds), *Law's Stories: Narrative and Rhetoric in the Law* 1996) 3.

culturally meaningful both the problems and their possible resolutions'.¹⁵ They explain that narrative consists of cumulative effects of separate stories as their aggregate meaning comes to light.¹⁶

James Boyd White's characterisation of the process of law reflects this notion of the accumulation of many stories:

... the law always begins in story: usually in the story the client tells, whether he or she comes in off the street for the first time or adds in a phone call another piece of information to a narrative with which the lawyer has been long, perhaps too long, familiar. It ends in a story, too, with a decision by a court or jury, or an agreement between the parties, about what happened and what it means. This final legal version of the story almost always includes a decision or an agreement about what is to remain unsaid. Beyond the story is a silence it acknowledges.¹⁷

The collective meanings obtained from these many stories, and the silences that each acknowledges, give rise to explanatory narratives. Patterson describes law as 'an interpretive exercise whose participants engage in the production of, and debate about, explanatory narratives'.¹⁸ Legal doctrine itself may even be interpreted as an explanatory narrative constructed from a set of stories. Baron and Epstein explain:

The substantive law of contracts, for example, may be perceived as telling a story of free will and free choice. Or the substantive law of rape may be understood as telling a story about how men and women communicate (dis)interest in sex. The justifications for the formalities of wills law might be said to involve a story about the potential for carelessness and greed in the setting of donative transfers. Any given set of doctrinal rules might be said to dictate what stories may emerge and how they may emerge in potential cases involving these rules; the

¹⁵ Baron and Epstein, above n 7, 147.

¹⁶ Ibid 148.

¹⁷ J B White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (1985) 168.

¹⁸ D M Patterson, 'Law's Pragmatism: Law as Practice and Narrative' (1990) 76 *Virginia Law Review* 937, at 940.

substantive law determines which facts will and which will not be deemed to bear on the problem at hand.¹⁹

In this way, a narrative of accidental personal injury can be identified as the cumulative effect of a set of stories that are frequently told in negligence actions arising from personal injury. Our legal system has a well established set of laws and procedures for injured people to seek redress for their injuries. Over the years repeated applications of the law have generated a standard, abstract, and generalised version of individual injury stories. Accordingly, from any particular injury story, there can be distilled an 'essential or abstract' injury narrative which is the same narrative that can be distilled from other like stories.²⁰ I call the legal narrative of accidental personal injury the 'legal injury narrative'.

This narrative is a *legal* narrative, to use Gilkerson's terminology, in that it is composed of 'positive elements such as rules and principles as well as dominant assumptions and stereotypes reflected in and reinforced by law that assign characteristics and define people in certain ways based on their positions or circumstances'.²¹ According to Gilkerson, legal narratives are 'recurring accounts of social interactions located within legal texts, precedent, and language...made up of socially constructed meanings arising from the interaction of social, cognitive, and rhetorical forces'.²² As such, the legal injury narrative is not easily identifiable, in the sense that it cannot be found explicitly laid out in a document such as a trial transcript or judgment. However, these documents do provide evidence of the underlying legal injury narrative's content and structure.

1.2 Studying Legal Narratives

The study of legal narratives has been ad hoc and inconsistent. However, it is possible to classify the work broadly along the lines proposed by Ewick and Silbey.²³ Ewick and Silbey outline a sociology of narrative in various contexts including academic sociolegal scholarship. However, it is important to note that

¹⁹ Ibid 142-143. (Footnotes omitted).

²⁰ D R Klinck, *The Word of the Law: Approaches to Legal Discourse* (1992) 298.

²¹ C P Gilkerson, 'Theoretics of Practice: The Integration of Progressive Thought and Action: Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories' (1992) 43 *Hastings Law Journal* 861, 867.

²² Ibid 871.

²³ P Ewick and S Silbey, 'Subversive Stories and Hegemonic Tales: Towards a Sociology of Narrative' (1995) 292 *Law and Society Review* 197.

in many cases where they refer to a 'narrative' they are referring to what Baron and Epstein defined as a 'story'. Ewick and Silbey explain that narrative can be the *product* of inquiry (the researcher's representation), the *object* of inquiry, or the *method* of inquiry.²⁴

1.2.1 Narrative as the Product of Inquiry

What Ewick and Silbey call 'narratives as the product of inquiry' are the stories told by the scholars themselves in producing accounts of social life.²⁵ The work of Patricia Williams²⁶ and Richard Delgado²⁷, in which they have written personal stories as a way of examining and understanding the law, is indicative of this type of scholarship.

Storytelling in this sense has been primarily used by outsider scholars²⁸ as a way of making alternative stories heard. In Ewick and Silbey's terminology, they are often subversive stories.²⁹ Legal storytelling in this sense has been applied to promote a broader understanding of the way that law affects people, by focusing on the effect of a particular law (or the absence of a law) on the lives of particular characters.³⁰ It has also been used to promote empathy.³¹

1.2.1 Narrative as the Object of Inquiry

What Ewick and Silbey call 'narrative as the object of inquiry' involves scholars examining 'how stories are produced through social action and function in mediating action and constituting identities...Research examines – across time and space – the various ways in which actors rely on narrative forms in interpreting and making sense of their worlds.'³² This kind of research can involve an analysis of individual stories that are told in a particular culture, or a

²⁴ Ibid 201.

²⁵ Ibid 203.

²⁶ P J Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (1991).

²⁷ R Delgado, 'Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) 87 *Michigan Law Review* 2411.

²⁸ Outsiders are those who are not part of the dominant culture (for example, minority groups such as African-Americans, gays and lesbians, women). Outsider scholarship is often aimed not at understanding the law, but at changing it. See R Delgado, 'On Telling Stories in School: A Reply to Farber and Sherry' (1993) 46 *Vanderbilt Law Review* 665; D A Farber and S Sherry, 'Telling Stories out of School: An Essay on Legal Narratives' (1993) 45 *Stanford Law Review* 807.

²⁹ Ewick and Silbey, above n 23.

³⁰ B L Apt, 'Aggadah, Legal Narrative and Law' (1994) 73 *Oregon Law Review* 943.

³¹ See for example Williams, above n 26 and Delgado, above n 28.

³² Ewick and Silbey, above n 23, 202.

broader inquiry into 'rules of participation and variable strategies of narration affecting when and why stories are told.'³³ In a sense this is the 'sociology of narrative' in that what is studied is the role and significance of narrative as a social act.³⁴ Scholars examine 'variations in local definitions of what constitutes an appropriate, reasonable, or persuasive narrative.'³⁵ The focus is on the production of meaning and social exchange through storytelling and narrative.³⁶ Such research involves a consideration of the forms of the actual stories told in the particular context under examination. For example, in a sociolegal context a researcher may study the content and construction of stories told by clients to their lawyers, or by self-represented litigants in court. Work by Sarat and Felstiner³⁷ and O'Barr and Conley³⁸ is representative of this kind of scholarship.

1.2.2 Narrative as the Method of Inquiry

Ewick and Silbey's third category of 'narrative as a method of inquiry' involves examining stories as a means to access or reveal some other aspect of the social world.³⁹ It constitutes a 'sociology through narrative insofar as it examines and invokes narratives as a mode of observation'.⁴⁰ Work by Pennington and Hastie⁴¹, Wagenaar et al⁴², and Bennett and Feldman⁴³ provides examples of how stories told in trials can be analysed in order to study judge and juror decisionmaking. An unusual example of this kind of work is Baron and Epstein's analysis of a scholarly article as a collection of stories in order to identify some hidden meanings in the text.⁴⁴

Many studies with stories as the object of inquiry also use the stories as a means of studying something else. For example, Sarat and Felstiner also examined the

³³ Ibid.

³⁴ Ibid 203.

³⁵ Ibid 202.

³⁶ Ibid.

³⁷ Sarat and Felstiner, above n 11.

³⁸ O'Barr and Conley, above n 12.

³⁹ Ewick and Silbey, above n 23, 202, quoting D E Polkinghorne, *Narrative Knowing and the Human Sciences* (1988).

⁴⁰ Ibid 203.

⁴¹ Pennington and Hastie, above n 10.

⁴² W A Wagenaar, P J Van Koppen and H R M Crombag, *Anchored Narratives the Psychology of Criminal Evidence* (1993).

⁴³ Bennett and Feldman, above n 10.

⁴⁴ J B Baron and J Epstein, 'Is Law Narrative?' (1994) 45 *Buffalo Law Review* 141.

stories of divorce clients as a method of studying the dynamics of the relationship between the clients and their lawyers.⁴⁵ O'Barr and Conley were also interested in what the litigants' stories might reveal about their goals and strategies and about the fairness and effectiveness of the small claims court as an institution.⁴⁶ Meyer⁴⁷ and Feigenson⁴⁸ also go beyond their analyses of attorneys' storytelling structure to suggest that it has particular benefits with respect to jurors' ability to reach a decision. Feigenson also explores the social, cultural and legal significance of the practice of thinking about accidents in melodramatic terms.

1.2.3 Studying the Legal Injury Narrative

My work uses two of Ewick and Silbey's categories of narrative scholarship: narrative as the object of inquiry and narrative as the method of inquiry. The object of my examination is the legal injury narrative and I use narrative as the method of inquiry by classifying and examining the legal injury narrative by reference to narrative genre.

1.3 Law, Literature, Genre

The relationship between law and literature is a controversial one, examined by Maria Aristodemou in her book *Law and Literature: Journeys from Her to Eternity*. She explains that what law and literature have in common is that they are both artificial constructs, concepts or abstractions that aim to create and impose order out of chaos.⁴⁹ Where law and literature differ, however, is in the extent to which they acknowledge their artificial origins. As Aristodemou argues, literature acknowledges and embraces its artificial origins, but law tends to conceal them, portraying legal narratives as natural, inevitable, and providing all the right answers.⁵⁰

However, by examining law as literature we are reminded that legal narratives are never free of gaps, silences, and ignorances, and that their tidy resolutions

⁴⁵ Sarat and Felstiner, above n 11.

⁴⁶ O'Barr and Conley, above n 12.

⁴⁷ Meyer, above n 13.

⁴⁸ Feigenson, above n 13.

⁴⁹ M Aristodemou, *Law and Literature: Journeys from Her to Eternity* (2000) 1.

⁵⁰ Ibid 2.

tend to belie the contradictions that gave rise to them.⁵¹ Aristodemou cautions that legal narratives may simply reproduce presupposed conclusions, “invent[ing] rather reflect[ing] our lives, ourselves and our worlds”.⁵² These narratives, although they may appear neutral, may not only “investigate but also suggest, create, and legislate meanings”.⁵³ Keeping these cautions in mind, I challenge, rather than submit, to the ideological messages hidden in both the literary and legal texts referred to in the following chapters.⁵⁴

Ewick and Silbey point out that stories and narratives can be either hegemonic or subversive.⁵⁵ A subversive story is ‘one that emplots the connection between the particular and the general by locating persons and events within the encompassing web of social organization’.⁵⁶ It challenges existing assumptions and stereotypes. In contrast, a hegemonic tale is one that articulates and reproduces existing ideologies and relationships of power and inequality.⁵⁷ Ewick and Silbey warn that hegemonic narratives can function as mechanisms of social control by:

- Providing instruction about expected behaviours and warning of the consequences of nonconformity;
- Colonizing consciousness with well-plotted but implicit accounts of social causality; and
- Hiding the grounds for their own plausibility.⁵⁸

Legal narratives are generally hegemonic. Jane Baron explains that legal narratives accomplish three functions: they represent culturally recognised truths, they communicate these truths and they sustain relationships of power by stating the legal ‘truths’ that legitimise the current possessors of power.⁵⁹ As such, legal narratives are more than just a collection of principles and rules. In their role in the ‘telling, receiving and interpretation of stories intended to explain, justify and

⁵¹ Ibid 2.

⁵² Ibid 2.

⁵³ Ibid 2.

⁵⁴ Ibid 6.

⁵⁵ Ewick and Silbey, above n 23.

⁵⁶ Ibid 223.

⁵⁷ Ibid 212.

⁵⁸ Ibid 222.

⁵⁹ J B Baron, 'Resistance to Stories' (1994) 67 *Southern California Law Review* 225, 266.

claim’⁶⁰ they form a collection of hegemonic or authoritative narratives that reflect and reinforce dominant assumptions and stereotypes.⁶¹ Rather than representing the way things are, legal narratives explain the way things should be.⁶²

However, by their very nature, legal narratives are not overtly instruments of social control and their power is often difficult to challenge. Once they become implanted in legal discourse, ‘they become normative (value-laden) interpretations of people and events that are difficult to dislodge, but easy to manipulate.’⁶³ Accordingly, Sherwin suggests that lawyers should evaluate omissions, inconsistencies, and plotlines that flow from deep (usually hidden) beliefs and assumptions which stem from subconsciously assimilated story forms, myths, and popular images.⁶⁴ Baron and Epstein also warn that it is important to:

recognize and assess the effect of these ingrained preferences on how we tell stories as well as on how we hear them, being particularly alert to the exploitation of instinctive preferences for narrative techniques like causal linearity, story closure, and tantalizing scripts and stereotypes.⁶⁵

My main arguments are based on, and develop, the premise that both law and literature help to create, and sustain, society’s status quo.⁶⁶ Or, in Cover’s words, the notion that law creates and maintains the ‘nomos’, or normative universe.⁶⁷ I also acknowledge Cover’s point that ‘no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning’ and that law and narrative are thus inseparably related.⁶⁸ Cover explains:

The codes that relate our normative system to our social constructions of reality and to our visions of what the world might be are narrative. The very imposition of a normative force upon a state of affairs, real or imagined, is

⁶⁰ C P Gilkerson, ‘Theoretics of Practice: The Integration of Progressive Thought and Action: Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories’ (1992) 43 *Hastings Law Journal* 861, 870.

⁶¹ *Ibid* 867.

⁶² R M Cover, ‘Nomos and Narrative’ (1983) 97 *Harvard Law Review* 4, 102.

⁶³ Gilkerson, above n 60, 871.

⁶⁴ Sherwin, above n 4.

⁶⁵ Baron and Epstein, above n 44.

⁶⁶ Aristodemou, above n 49, 6.

⁶⁷ Cover, above n 62.

⁶⁸ *Ibid* 4-5.

the act of creating narrative. The various genres of narrative -- history, fiction, tragedy, comedy -- are alike in their being the account of states of affairs affected by a normative force field.⁶⁹

Since Burke's 'Grammar of Motives',⁷⁰ and Propp's analysis of folk narratives⁷¹, the idea has developed that one principled way of analysing narrative is to fit it into classic literary form.⁷² By fitting an explanatory narrative into one of the classic literary genres, the end point to which the explanation orients itself can be identified.⁷³ Genre provides the rules and conventions by which narratives, in literature and in law, constrain narrators to normative meanings.⁷⁴ As Derrida writes: 'as soon as a genre announces itself, one must respect a norm, one must not cross a line of demarcation, one must not risk impurity, anomaly or monstrosity'.⁷⁵ Genre affects what and how things can be referred to, and also the status and authority of what the speaker says.⁷⁶

Genre can be defined as a class of stories sharing certain norms and tendencies, which are understood by both narrator and audience.⁷⁷ Genre also defines the audience – to whom the narrative is addressed.⁷⁸ Goodrich explains that:

Each genre and each type of audience is to be analysed in terms of the values, beliefs and attitudes that it is likely to adhere to, that are persuasive to it or that are of particular relevance for it.⁷⁹

While the primary legal audience is composed of 'the law itself, or more particularly, the various strata of officials of the legal system',⁸⁰ many legal narratives are addressed more broadly to a wider audience including those in society who are subject to the imperatives of the legal narratives in question. In

⁶⁹ Ibid 10.

⁷⁰ K Burke, *A Grammar of Motives* (1969).

⁷¹ V Propp, *Morphology of the Folktale* (first published 1928, 2nd English ed, 1968).

⁷² C Antaki, *Explaining and Arguing: The Social Organisation of Accounts* (1994) 95.

⁷³ Ibid 96.

⁷⁴ J Derrida, "The Law of Genre", in D Atridge (ed), *Acts of Literature* (1992) 224-5.

⁷⁵ Ibid.

⁷⁶ P Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (1986) 174.

⁷⁷ R A Ferguson, 'The Judicial Opinion as a Literary Genre' (1990) 2 *Yale Journal of Law and the Humanities* 201; Frye, Northrop, *Anatomy of Criticism* (1957) 247.

⁷⁸ P Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (1986) 176-8.

⁷⁹ Ibid 177.

⁸⁰ Ibid 116-117.

some instances legal narratives are publicly retold to a broader audience through the media.⁸¹ Many legal narratives also have effect not only as a communicative, public act, but as a private one through which participants in the legal storytelling make sense of it for their own understanding.⁸²

Examining the legal injury narrative by fitting it to the genre of melodrama provides a different perspective on many aspects of personal injury litigation and reveals some interesting insights about the way in which the law and society treats those who are injured. In particular, the legal injury narrative's melodramatic nature emphasizes the existing inadequacies in personal injury law, which have broader consequences for society as a whole.

1.4 Law, Melodrama and Tragedy

The relationship between law and genres such as melodrama and tragedy has been examined by a number of different scholars in a number of different contexts. For example, the essays in *Law/Media/Culture: Legal Meaning in the Age of Images*⁸³ reveals the influence of the genre of melodrama across a wide range of legal areas. The relationship between genre and personal injury litigation has been explored by Feigenson, Meyer and Galligan. Neal Feigenson suggests that accidents tend to be portrayed by plaintiff lawyers in melodramatic terms and explores the way in which jurors tend to blame in melodramatic narrative patterns.⁸⁴ Phil Meyer shows how a trial advocate uses conventions of melodrama to create a persuasive argument in a closing address to a jury. Thomas Galligan suggests that personal injury cases may fit the genre of tragedy. The work of these three scholars is summarised in the following sections.

1.4.1 Feigenson's 'Legal Blame'

In *Legal Blame: How Jurors Think and Talk About Accidents*, Feigenson notes that legal blame derives from a combination of common sense, legal rules, expert rationales (such as theories of corrective and distributive justice), and the facts of individual cases. He examines, in particular, the element of common sense by

⁸¹ See for example E Rapping, 'Legal Meaning in the Age of Images: Television, Melodrama, and the Rise of Victims' Rights Movements', (1999/2000) 43 *New York Law School Law Review* 665.

⁸² M A Coffino, 'Genre, Narrative and Judgment: Legal and Protest Song Stories in Two Criminal Cases' (1994) *Wisconsin Law Review* 679, 717.

⁸³ (1999/2000) 43 *New York Law School Law Review*.

⁸⁴ Feigenson, above n 13.

reviewing a considerable amount of psychological literature and a number of legal cases. Feigenson argues that common sense blaming involves treating accidents as personality-driven melodramas. His thesis is that jurors tend to blame defendants in a melodramatic fashion – focusing on a single villain and ignoring systemic causes of accidents. He suggests that jurors applying this common sense approach to the attribution of blame and liability in accident cases often ‘get it right’.⁸⁵ In other words, jurors’ decisions are often consistent with the law (that is, consistent with the way lawyers and judges would attribute blame and liability in similar cases).

Feigenson explains this tendency towards melodramatic blaming as a result of changes in society as well as pre-existing psychological habits. His starting point is that, in many cases of accidental injury, it is impossible to simplify blame by directing it to one party. He notes that with advancements in technology, people have been led to expect that everyday risks can be controlled.⁸⁶ Accidental harm thus becomes more shocking and there is a greater need to make sense of it. Feigenson then states that ‘melodrama is one of the primary ways people do this.’⁸⁷ Feigenson suggests that our predisposition towards melodramatic explanations for accident harm has been encouraged in the last forty years by an increase in exposure to melodramatic television and media reporting.⁸⁸ However, he points out that it is not the influence of melodrama giving rise to the way we think about accidents. On the contrary, it is our pre-existing habits of thought that give rise to our melodramatic manner of thinking.⁸⁹ Feigenson then goes on to review in detail the cognitive psychological literature about attribution of blame and draws parallels with characteristics of melodrama.⁹⁰

Feigenson notes that the three main characteristics of melodramatic blaming are that it is simplified, dichotomized and moralized.⁹¹ It is simplified in that bad

⁸⁵ N R Feigenson, *Legal Blame: How Jurors Think and Talk About Accidents* (2000) 228.

⁸⁶ Ibid 224.

⁸⁷ Ibid.

⁸⁸ Ibid 215.

⁸⁹ Ibid 97.

⁹⁰ O’Connell and Baldin’s article provides a neat summary of the main psychological theories discussed by Feigenson: J O’Connell and J R Baldwin, ‘(in)Juries, (in)Justice, and (II)Legal Blame: Tort Law as Melodrama - or Is It Farce?’ (2002) 50 *University of California Law Review* 425. However, it is beyond the scope of this thesis to explore the psychological cause of our tendency towards melodramatic blaming, so I will not review Feigenson’s work in this area here.

⁹¹ Feigenson, above n 855, 14.

outcomes tend to be attributed to bad behaviours, which in turn are seen to be performed by bad people. Blaming is monocausal in the sense that, if there is an immoral person who has somehow contributed to the accidental injury, jurors are most likely to attribute legal responsibility for the entire injury to that morally blameworthy person. Blaming is also dichotomized, largely as a result of the personal injury litigation system itself. There is limited scope for the jurors to decide blame outside the bipolar framework of the plaintiff and the defendant. The moralized aspect of blaming refers to the normative expectations jurors have about the appropriate behaviour of plaintiffs and defendants in particular circumstances. For example, a parent is generally expected to take care to protect his or her children from harm. Feigenson demonstrates how, in the case of *Faverty v McDonald's Restaurants of Oregon Inc.*,⁹² McDonald's was blamed in this way, characterised as the evil villain who failed to take care of its young employee.

Although I agree with many of Feigenson's arguments, my approach differs from his in a number of significant ways. This thesis is not concerned with the attribution of blame by laypersons and jurors. Rather, it examines how the language of blame used in the legal injury narrative tends to reflect the language of blame in melodrama. In other words, I argue that the way in which lawyers and judges attribute blame and liability in personal injury cases tends to be melodramatic. In this sense, Feigenson's finding that jurors' often 'get it right' is not surprising.

However, where my analysis diverges from Feigenson's is that I do not assume that the way in which lawyers and judges attribute blame and liability in personal injury cases is 'right'. As Jeffery O'Connell and Joseph Baldwin, in their review of Feigenson's book, point out, he fails to develop the point that the melodramatic nature of decision making in personal injury trials simply emphasizes 'the huge inadequacies and inefficiencies of tort law itself'.⁹³ This is one of the points that I wish to make in this thesis: that the melodramatic nature of blame in the legal injury narrative has a number of concerning consequences.

⁹² 892 P.2d 703 (Or. Ct. App. 1995).

⁹³ O'Connell and Baldwin, above n 90, 430.

These consequences have implications for society as a whole, as well as for plaintiffs in personal injury litigation in particular.

1.4.2 Meyer's 'Making the Narrative Move'⁹⁴

Meyer analyses a lawyer's closing argument in the trial of *Karen Silkwood v Kerr McGee Inc.*⁹⁵ He demonstrates how the lawyer employed the structural components and genre conventions of melodrama and myth to transform evidentiary argument into story. Meyer argues that there is a close relationship between the conventions of legal storytelling at trial and other popular storytelling practices, particularly the genre conventions of popular entertainment films. Meyer demonstrates how the lawyer provided:

...a concurrent and powerfully cathartic popular melodrama of blame, explanation, and entertainment - the story of good versus evil, of a darkly sinister and monstrous corporation against the heroic individual who is willing to stand up to corporate greed and institutional corruption, and ultimately willing to sacrifice herself for her values, and for the good of others not as strong as herself.⁹⁶

Meyer shows how the lawyer structures the story in accordance with the melodramatic genre: he explores the identity of the heroine/plaintiff, resolves the mystery of what happens to her, and concludes with a call for dream justice. The relationship between the plaintiff and defendant is formed as a story of good against evil, and the characters are ascribed psychological traits according to their roles.⁹⁷ Just as Feigenson demonstrates the portrayal of McDonald's as an evil villain, Meyer reveals how the lawyer in *Silkwood* attributes human qualities to the defendant company 'as if the corporation is a unitary entity with powers of thought and intention', fitting the role of evil antagonist.

The defendant's witnesses are agents of the evil corporation, subsumed by the will of the greedy and devouring corporate monolith, who devalues the lives the workers they destroy with cancer and plutonium, in disregard of the public good. Plaintiff's witnesses, the workers at the plant, are innocents,

⁹⁴ Meyer, above n 13.

⁹⁵ The text of the closing argument in that case is presented in M S Lief, H M Caldwell, and B Bycel, *Ladies and Gentlemen of the Jury: Greatest Closing Arguments in Modern Law* (1998) 119-122.

⁹⁶ Meyer, above n 13, 242-243.

⁹⁷ Ibid 246-247.

victims, members of a community without a voice - until the appearance of Karen Silkwood [the plaintiff].

The plaintiff's mute role is also clear. Her death finally preventing her from revealing what she knew about the defendant's practices.⁹⁸ The defendant 'extinguished [her] voice'. However, others come forward to ensure that her message is passed on. The lawyer explicitly identifies her as the heroine of the story:

I think she was a heroine. I think her name will be one of the names that go down in history, along with the great names of women heroines. I think she will be the woman who speaks through you, and may save this industry and this progress and may save, out of that industry, hundreds of thousands of lives.

Meyer suggests that in personal injury trial stories melodrama provides 'suggestive models that the effective legal storyteller may choose from and deploy'. He argues that a study of popular melodramatic films can provide lawyers with templates to use in closing arguments at trial. He suggests that a melodramatic storyline can be used to entice the audience (by which he means the jury) to reach a conclusion that is portrayed as the obvious and correct one. He explains that in melodramatic narratives:

the distinctions between right and wrong or good and evil are unequivocal. A crisis - from crino, 'to judge'--is central to many stories, but whereas in tragedy it clarifies or illuminates the double bind of human existence, in melodrama it relieves us of conflict and doubt.⁹⁹

Meyer's argument, that in personal injury litigation a melodramatic narrative can relieve the audience from conflict and doubt, is one that I will develop throughout this thesis. However, rather than looking at the melodramatic story told by a lawyer in a closing argument to a jury, I will consider the melodramatic story told by the law to a much wider audience.

⁹⁸ Ibid 261-262.

⁹⁹ Ibid 269-270.

1.4.3 Galligan's 'The Tragedy in Torts'¹⁰⁰

In his article 'The Tragedy in Torts', Thomas Galligan argues that torts may have a tragic value for our society. He attempts to explain how a personal injury case may fit the genre of tragedy, by focusing on the element of catharsis. He suggests that the audience in personal injury trials (made up of both the jury as decision maker and society) vicariously experience the plaintiff's injury experience through the trial process. He also emphasises the bi-polarity of tort litigation, by contrasting the plaintiff's and the defendant's stories in the trial.

Although I agree with Galligan's interpretation of personal injury trials as a drama in which the decision maker plays the part of both audience and adjudicator, I disagree with his definition of tragedy and that personal injury litigation fits that genre. In particular, I suggest that the bi-polarity between the plaintiff and defendant is more akin to the genre of melodrama. Galligan also appears to have misunderstood that a fundamental aspect of tragedy is that the characters suffer from internal conflict, not from conflict with one another (which is indicative of the melodramatic genre).

1.5 Conclusion

This chapter has identified a wide range of scholarship relating to law, storytelling and narrative. Three different methods of studying narrative were then discussed and examples of studies using each method to example legal narratives were given. These studies form the basis of my choice of methodology, discussed in detail in the next chapter.

This chapter also introduced the idea that legal narratives have the potential to become normative. This will become an important theme of the remainder of this thesis, in which the normative nature of the legal injury narrative will be analysed in depth.

Finally, the relationship between law, literature and genre was explored, and in particular, the relationship between genre and normative narratives. Three examples of scholarship examining personal injury litigation and the genres of melodrama and tragedy were then considered. The three works reviewed form the basis of my development of the concept of the legal injury narrative and the

¹⁰⁰ T C Galligan, 'The Tragedy in Torts' (1996) 5 *Cornell Journal of Law and Public Policy* 139.

remainder of this thesis builds on, and in some cases, criticises and contradicts, the conclusions reached by those three authors. However, this thesis attempts to take a meaningful step towards developing a ‘more complete and systematic topography of the uncharted territory of the interpenetration of legal and popular storytelling’ called for by Meyer.

Chapter 2

Melodrama

Introduction

In order to examine the legal injury narrative through melodrama, it is important to clarify the precise characteristics of the genre. This chapter begins by providing a definition of melodrama. The following section summarises the plots of a number of Pixérécourt's plays that represent prototypes of the melodramatic genre. These plays will be referred to as examples in later chapters. Melodrama's roles and characters are then considered, with particular focus on the roles of heroine, villain and judge. An introduction to the mute role then leads into a broader discussion about melodrama's text of muteness and its relationship to suffering. The historical function of melodrama as an instrument of moral instruction is the subject of the penultimate section of this chapter. Finally, a comparison is made between the characteristics of melodrama and those of the genre of tragedy.

2.1 Melodrama Defined

Melodrama originated in France around the time of the French Revolution. French playwright Pixérécourt is generally accepted as the father of the genre. Melodrama began in the boulevard theatres, and it is now seen in basically the same form in modern films, novels and television series. From Pixérécourt's time to the modern day, melodrama has been the subject of critical debate, and the word 'melodramatic' still has derogative connotations. However, since the late 1960s various scholars have studied the form and pointed out that melodrama as a genre is not necessarily a lower form of romance or tragedy.

Singer notes that the term melodrama is notoriously ambiguous. He suggests the most useful way to deal with its 'generic slipperiness' is to define it as a 'cluster concept' encompassing a number of elements.¹ In particular, melodrama involves different combinations of five consitutive elements: moral polarization,

¹ B Singer, *Melodrama and Modernity: Early Sensational Cinema and Its Contexts* (2001) 54.

overwrought emotion, pathos, nonclassical narrative mechanics and sensationalism.² These elements will be addressed in turn.

2.1.1 Moral Polarization

Melodrama is dependent on Manichean dichotomies³, so melodramatic characters are monopathic, representing extremes of good and evil. A character can only be morally good or morally bad. There is no middle ground and no allowance for ambiguity.

In classical melodrama the main virtuous role is usually represented by a young heroine.⁴ Other virtuous roles include the hero, the father-figure, authority figures such as doctors, and various comic roles. The villain is usually the main personification of evil, although he is sometimes accompanied by wicked henchmen.⁵

2.1.2 Overwrought Emotion and Pathos

The binary opposition between virtue and vice is reinforced by appeals to the audience's emotions. In particular, appeals are made to negative emotions directed against the villain (hatred, fear, vindictiveness). The villain is always portrayed as driven by a morally negative motivation such as ambition, avarice, anger, jealousy or lust.⁶ In classical melodrama these emotions are demonstrated by notorious overacting. Melodrama triggers in the audience an agitation arising from observing extreme moral injustice: 'Melodrama was designed to arouse, and morally validate, a kind of primal bloodlust, in the sense that the villain is so despicable, hated so intensely, that there was no more urgent gratification than to see him extinguished'.⁷

² Ibid 37.

³ Manichaeism refers to a religious system of the third-fifth centuries, representing Satan in a state of everlasting conflict with God; a dualist system of extreme good against extreme evil.

⁴ See P Brooks, *The Melodramatic Imagination* (1976) 32.

⁵ Hyslop identified that in the fifty melodramas we have that Pixérécourt wrote between 1798 and 1835, only four female characters are evil: *Le Pèlerin blanc* (*The White Pilgrim*) 1801, *Olivier* 1829, *Le Jésuite* 1830, and *L'Abbaye aux bois* (*The Abbey in the Woods*) 1832. Almost all of these evil women are the victims of wicked or foolish men; they are accomplices and not real villains. They also taken on masculine characteristics and clothing, and move in male domains (rather than the domestic, family role). G Hyslop, 'Deviant and Dangerous Behaviour: Women in Melodrama' (1985) 19(3) *Journal of Popular Culture* 65, 69-72.

⁶ J L Smith, *Melodrama* (1973) 20.

⁷ Singer, above n 1, 40.

The other extreme of emotion is directed towards the heroine. Singer explains that melodrama activates various kinds of excess in the spectator's visceral responses, arousing sentiments that make the audience cry or encourage strong pathos.⁸ Pathos is a quality that excites pity or sadness, and comes from the Greek word *pathos* meaning suffering. Singer quotes Aristotle's definition of pity as 'a sort of pain at an evident evil of a destructive or painful kind in the case of somebody who does not deserve it, the evil being one which we might imagine to happen to ourselves'.⁹ He points out that pathos involves the perception of moral injustice against an undeserving victim, as well as emotional identification or association with them.¹⁰

This need for identification with the victim gives rise to a problem with which, Mullen argues, melodrama is characteristically concerned - the problem of expressing the radical interiority and communication of an individual's lived and felt experience, particularly that of the suffering heroine.¹¹ Melodramatic narratives place considerable focus on the heroine's suffering¹² and ask the audience to endure with her the extremes of pain and anguish.¹³

2.1.3 Nonclassical Narrative Mechanics

In terms of plot, classical melodrama usually consists of three Acts: the first demonstrates the good characters in a state of virtue and happiness; the second involves the 'primal scene' in which this state comes under threat due to the actions of the villain; the final Act is the scene of the trial, in which virtue and vice are recognised, the villain gets his come-uppance, and virtue is rewarded.

Melodramatic plots are highly topical, representing the fears and aspirations of the people of their time.¹⁴ Classical French melodrama such as Pixérécourt's works dramatized murder and mayhem to symbolically rid new society of

⁸ Ibid 39.

⁹ Ibid 44.

¹⁰ Ibid 45.

¹¹ M Mullen, "Sympathetic Vibrations: The Politics of Antebellum Melodrama", <http://www.ags.uce.edu/~ishmael/main.htm>, accessed 15/08/2002.

¹² N R Feigenson, 'Legal Meaning in the Age of Images: Accidents as Melodrama' (1999/2000) 43 *New York Law School Law Review* 741, 745.

¹³ Brooks, above n 4, 35.

¹⁴ R B Heilman, *Tragedy and Melodrama: Versions of Experience* (1968) 92.

violence viewed as a product of the Revolution.¹⁵ In later American melodrama, villains represented a changing social environment, and were progressively characterised by royalty and nobility, aristocracy, bosses, capitalists, socialists, labor, the bourgeoisie, intellectuals, and hippies.¹⁶ Domestic melodrama frequently portrayed the upper classes as heartless oppressors and seducers¹⁷ and stressed the significance of the father-daughter relationship, and family affairs more generally.¹⁸ Melodrama has also responded to specific social issues such as industrial unrest, urban squalor and the problems of drink.¹⁹

Melodramatic plots do not follow a logical cause-and-effect structure and have great tolerance for outrageous coincidence and implausability.²⁰ The plot develops with breathtaking peripety. Lea Jacobs has suggested that the heart of melodrama is the element of 'situation'.²¹ Singer suggests that situation may be defined as 'a striking and exciting incident that momentarily arrests narrative action while the characters encounter a powerful new circumstance and the audience relishes the heightened dramatic tension'.²² The main instance of situation in melodrama is the event which causes the main virtuous character's life to suddenly change from extreme heights of happiness to extreme depths of despair.²³ However, Singer points out that situation in melodrama need not be a brief, climactic local instant of arrested action – it may be a much more diffuse condition of frustration or futility throughout the plot.²⁴

Events are always portrayed as having been caused by individual human agency and actions are always explicable in terms of the individual's characters.²⁵ Thus, the evil characters perform despicable actions, but the virtuous characters demonstrate only virtuous conduct. The nature of melodrama means that morality becomes individual and personal.

¹⁵ J P Marcoux, *Guilbert De Pixérécourt: French Melodrama in the Early Nineteenth Century*, Studies in French Theatre (1992) 6.

¹⁶ Heilman, above n 14, 104.

¹⁷ M R Booth, *English Melodrama* (1965) 123.

¹⁸ Ibid 126.

¹⁹ Ibid 136.

²⁰ Singer, above n 1, 46.

²¹ Cited in ibid 41.

²² Ibid.

²³ Brooks, above n 4, 36.

²⁴ Singer, above n 1, 43.

²⁵ Feigenson, above n 12, 745.

Melodrama always involves a fight to recognise virtue.²⁶ This usually culminates in the form of a trial during which the heroine, with assistance from her supporters, must convince the judge/father-figure of her virtue. To prove her virtue, she must usually prove her moral identity. Traditionally in melodramatic theatre there are documents such as birth certificates setting clear identification and recognition.²⁷

The story ends with public recognition of virtue and evil and the eradication of evil to reward the virtuous. Melodrama primarily reinforces the idea of the morally good by providing a very public representation and recognition of virtue.²⁸ It also demonstrates that virtue's suffering is caused by the moral failings of the villain. This personification of moral evil simplifies the often complex question of responsibility for suffering.²⁹ Audiences can thus enjoy the seductive pleasures of melodramatic wholeness without considering the effects on those outside the narratives or acknowledging alternatives.³⁰

2.1.4 Sensationalism

Singer defines sensationalism as an 'emphasis on action, violence, thrills, awesome sights, and spectacles of physical peril'.³¹ On stage, spectacular effects included the presence of real fire engines, horses, and larger than life props and stage design.

Melodrama is stereotypically sensational, in action as well as scenic spectacle. However, as Singer demonstrates, sensationalism actually contains a considerable degree of realism. Events portrayed in melodrama 'nevertheless correlated, even if only loosely, with certain qualities of corporeality, peril, and vulnerability associated with working class life'.³²

It was, in effect, an exaggeration of reality, rather than a replacement for it. However, some aspects of reality were overshadowed. Melodrama eradicated

²⁶ Brooks, above n 4, 29.

²⁷ Ibid 39. In the injury narrative this is represented by medical reports.

²⁸ Ibid 25.

²⁹ Feigenson, above n 12, 741.

³⁰ Smith, above n 6, 9.

³¹ Singer, above n 1, 48.

³² Ibid 53.

‘any characterological complexity, emotional entanglement, or sentiment in favour of a focus on physical action and violence’.³³

2.2 Pixérécourt’s Melodramas

In this thesis I will refer to and use as examples the melodramas of René-Charles Guilbert de Pixérécourt, particularly his play *Coelina ou l’enfant du mystère* (*‘Coelina’*). In the context of studying the melodramatic nature of legal narratives, it is perhaps more than a coincidence that, although Pixérécourt’s early education focused on literature and philosophy, he subsequently studied law. However, his preparations for a career at the Bar were cut short by the French Revolution in 1789.³⁴ His play *Coelina* opened at the Ambigu-Comique on 2 September 1800.

2.2.1 *Coelina, ou l’enfant du mystère*³⁵

Coelina is the play most often associated with the birth of French melodrama and the melodramatic genre.³⁶ Based on a popular novel by Ducray-Duminil, it is a story about an orphaned girl, Coelina, who is in the care of her ward, Dufour, the brother of Coelina’s supposed father. Coelina is in love with Dufour’s son Stephany, and he loves her in return. However, Truguelin, the brother of Coelina’s deceased mother, is a wicked man who plots to gain control of Coelina’s inheritance by arranging a marriage between her and his son. When Truguelin’s plans are thwarted, he reveals that Dufour’s brother was not, in fact, Coelina’s father. As it turns out, her real father is Francisque, an impoverished mute man who has been sheltering at Dufour’s house. At this news, Dufour declares Coelina a ‘child of adultery’ and banishes her and Francisque from his home. For the remainder of the play Dufour, with the assistance of various other characters, particularly the doctor Andrevon, attempt to unravel the confusion and find out the truth about Coelina’s parentage. Although Francisque knows all, he is mute and accordingly unable to explain matters without difficulty.

³³ Ibid.

³⁴ Marcoux, above n 15, 19.

³⁵ *Coelina, or The Child of Mystery*. Melodrama, 3 acts. Published 1803. Produced Théâtre de l’Ambigu-Comique, Sept. 2, 1800. Note that I have adopted the French grammatical convention for capitalisation of the play titles.

³⁶ Marcoux, above n 15, 2.

2.2.2 Le chien de Montargis, ou La forêt de Bondy³⁷

The story revolves around the murder of Aubri, a junior officer in a company of the King's soldiers. Aubri's dog 'Dragon' discovers his master's body and is instrumental in the murderous villain's downfall. The villain of the play is Macaire, a senior officer in the company and he is assisted by another officer and friend Landry. The company of soldiers is staying at an Inn run by Mistress Gertrude. Ursule is a housekeeper at the Inn and she is in love with the mute porter, Eloi. When Aubri's body is discovered, and Eloi is found in possession of some of Aubri's things, Eloi is falsely accused of his murder. However, Eloi is unable to explain himself due to his muteness, and the other virtuous characters must work hard to convince the King's Magistrate of his innocence and identify the true murderer.

2.2.3 Les ruines de Babylone, ou Jafar et Zaida³⁸

Les ruines de Babylone is an historical melodrama based on the legends surrounding the heros of A Thousand and One Nights. Harun, the Caliph of Baghdad, allows his sister Zaida to marry the Barmecide Jafar on the condition that they live as brother and sister (and thus avoid the chance of any offspring disputing the throne). However, Jafar's love for Zaida resulted in him breaking his promise, and Zaida secretly bore his child. Isuf is the chief eunuch and is jealous of Jafar, wanting to secure his own place as the Caliph's favourite. Once he discovers Jafar's secret and exposes it to the Caliph, Harun orders the execution of Jafar and his son, and banished his sister from the palace. Zaida is then rescued by the Harun's son, Hassan, who does not recognise her. When Harun's life is subsequently threatened and his salvation appears to lie in Jafar's hands, he must reconsider his feelings for both Jafar and Zaida.

2.2.4 La fille de l'exilé, ou huit mois en deux heures³⁹

This play is set in the frozen wastelands of Siberia. Elisabeth, the sixteen-year-old heroine, travels from Siberia to Moscow to beg the Tsar to restore her falsely accused father and his family to their rightful position in Russian aristocratic

³⁷ *The Dog of Montargis, or The Forest of Bondy*. Melodrama, 3 acts. Published 1814. Produced Théâtre de la Gaité, June 18, 1814.

³⁸ *The Ruins of Babylon, or Jafar and Zaida*. Historical melodrama, 3 acts. Published 1810. Produced Théâtre de la Gaité, Oct. 30, 1810.

³⁹ *The Exile's Daughter, or Eight Months in Two Hours*. Historical melodrama, 3 parts. Published 1819. Produced Théâtre de la Gaité, Mar. 13, 1819.

society. Along the way she is threatened by a band of Tartars, and also comes across the villain, Ivan, the cause of all her family's problems. Ivan has received his punishment in the form of the death of his own daughter. When Ivan's life is threatened by the Tartars, Elisabeth saves him by a dramatic display of virtue. The Tartars are awed by Elisabeth's extraordinary generosity and offer her gold. The Tsar is also impressed by Elisabeth's virtue, resulting in him pardoning her father and restoring his title and lands.

2.2.5 Rosa, ou L'hermitage du Torrent⁴⁰

Rosa and her son, threatened by the villain, a lusty landlord, have to flee from their cottage into the wilderness. They are temporarily sheltered by a kind hermit, but are later captured by the villain and imprisoned in a castle, along with Rosa's husband, who is caught while attempting to rescue them. They all eventually escape when Rosa's son manages to steal some keys and release his parents.

2.2.6 Les mines de Pologne⁴¹

The villain Zamoski has been in love with the beautiful Floreska for some time. However, she fell in love with and married Edwinski, who Zamoski has never forgiven. Zamoski kidnaps Floreska and her daughter Angéla and imprisons Edwinski deep in the mines of Poland. Angéla assists her parents' escape by stealing the jailer's keys and intercepting the password.

2.2.7 L'homme à trois visages, ou Le proscrit⁴²

This play, set in Venice, tells the story of Vivaldi, a noble youth falsely accused by the villain Orsino and banished by the Doge. He becomes a soldier of fortune and becomes aware of a plot by Orsino to assassinate the Doge. Vivaldi assumes three identities in order to unravel the plot. The heroine, Rosamonde, is the daughter of the Doge and Vivaldi's secret bride of eight years. Rosamonde attempts to defend her wrongly accused husband, Vivaldi, to the Doge. At Vivaldi's hand the Doge is saved and Rosamonde is reunited with her husband.

⁴⁰ *Rosa, or the Torrent Hermitage*. Play. Published 1800.

⁴¹ *The Mines of Poland*. Melodrama, 3 acts. Published 1803. Produced Théâtre de l'Ambigu-Comique, May 3, 1803.

⁴² *The Venetian Outlaw*. Drama, 3 acts. Published 1801. Produced Théâtre de l'Ambigu-Comique, 1801.

2.2.8 La femme à deux maris⁴³

Eliza is a woman with a past who, in her youth, was seduced by the villain Fritz, only to have him desert her and an infant son. She later marries the Count but does not reveal that the boy she protects is her own son. Fritz returns, threatening to expose her as a bigamist and as the mother of the boy. Various attempts at blackmail are thwarted, however the innocent Count, upon hearing about his wife's past, prepares to leave her for morality's sake. The villain then attempts to murder the Count in revenge for the collapse of his scheme.

2.2.9 Charles le Téméraire, ou le siège de Nancy⁴⁴

The city of Nancy is under siege by Charles the Bold, Duke of Burgundy. Léontine is the mother of four-year-old son Marcelin, whom Charles has taken prisoner and threatens to kill. Charles hopes that Léontine will convince her father, the Governor, to surrender the city in order to save her son. However, Léontine is patriotic and refuses to ask for special treatment for her family. She volunteers to travel to René to seek assistance for her city. On a number of occasions she must put herself in serious danger in order to save her son, and finally has to engage in a sword fight with Charles, who she finally kills. In the end Léontine saves both her family and her city.

2.3 Melodrama's Roles and Characters

Melodrama's roles are filled by characters who are stock types, stereotypes and wooden abstractions.⁴⁵ They are 'monopathic' in the sense that they are whole and undivided.⁴⁶ 'Wholeness' in this sense is a technical structure of character and personality. Characters in their wholeness are devoid of psychology in the sense that they have no inner conflict and are not concerned with self-doubt or fate.⁴⁷ Any conflict is between the characters, rather than internal.⁴⁸ However, this wholeness is morally neutral in that the characters are whole in their goodness or badness, weakness or strength, hope or hopelessness.⁴⁹ Whichever

⁴³ *The Wife of Two Husbands*. Drama, 3 acts. Published 1802. Produced Théâtre de l'Ambigu-Comique, Dec. 27, 1802.

⁴⁴ *Charles the Bold, or The Siege of Nancy*. Historical melodrama, 3 acts. Published 1814. Produced Théâtre de la Gaîté, Oct. 26, 1814.

⁴⁵ F Rahill, *The World of Melodrama* (1967) 9.

⁴⁶ Marcoux, above n 15, 12.

⁴⁷ Brooks, above n 4, 35; Heilman, above n 14, 79; Marcoux, above n 15, 12.

⁴⁸ Heilman, above n 14, 79.

⁴⁹ Ibid 80.

side of the moral coin the characters fall, they are 'notable for their integrity, their thorough exploitation of a way of being or of a critical conjuncture'.⁵⁰ They are either good or evil, and these character traits are highly personalised.⁵¹ People are true to their superficial appearances and consistently think and behave in the same way.⁵² Characters are never indecisive and accordingly do not have to choose between alternative courses of action.⁵³ The appropriate course of action is obvious because it is what a 'good' or 'evil' character would do. Their behaviour is interpreted by their stock characterisation.⁵⁴

Given the lack of interior depth in the characters, melodrama focuses on what the characters do, rather than why they do it.⁵⁵ There is a complete subordination of character development to the story line.⁵⁶ The characters represent extremes, and also experience extremes.⁵⁷ The virtuous heroine goes from a happy and contented existence to the ultimate in suffering. The villain goes from a position of power and control, to receiving his comeuppance.

As well as the main melodramatic roles being polarized on a moral basis, they are also reciprocal on the basis of femininity and masculinity. Connell points out that masculine and feminine sex roles are inherently reciprocal: 'polarization is a necessary part of the concept'.⁵⁸ The feminine character of the heroine is stereotypically feminine: passive, reactive and responsive.⁵⁹ Inherently associated with weakness, she is constituted as the 'other' to the male subjects of the villain and the judge. The masculine characters propel the narrative by investigating and manipulating the passively displayed heroine.⁶⁰ She is 'the object, not the subject, of the gaze, and her body is eroticised and often fragmented'.⁶¹

⁵⁰ Brooks, above n 4, 36.

⁵¹ Ibid 16.

⁵² Booth, above n 17, 14 and 15.

⁵³ Heilman, above n 14, 85.

⁵⁴ A MacIntyre, *After Virtue: A Study in Moral Theory* (2nd ed, 1984) 27.

⁵⁵ Marcoux, above n 15, 12.

⁵⁶ Booth, above n 17, 15.

⁵⁷ Brooks, above n 4, 36.

⁵⁸ R W Connell, *Masculinities* (1995) 26.

⁵⁹ J Byars, *All That Hollywood Allows: Re-Reading Gender in 1950s Melodrama* (1991) 18.

⁶⁰ L Jacobs, 'The Women's Picture and the Poetics of Melodrama' (1993) 31 *Camera Obscura* 121, 123.

⁶¹ In Freudian terms, the woman is seen as "castrated", the damaged version of the male. S Thornham (ed), *Feminist Film Theory: A Reader* (1999) 54.

Both the villain and the judge are representative of mainstream masculinity, fundamentally linked to power, organized for domination and resistant to change because of power relations.⁶² Consistent with melodrama's hegemonic nature, the characteristics of the feminine and masculine characters are normative.⁶³ Melodrama never questions the appropriateness of the masculine and feminine roles. They are portrayed as natural and the way things should be.

2.3.1 Villain

In melodrama the villain is the embodiment of evil and the dark violence of melodrama.⁶⁴ 'It is the villain who most fully articulates the stark monochrome of his moral character, his polarized position in the scheme of things.'⁶⁵ He is wholly black, a 'deep-dyed villain', the traître or tyran, scheming and unprincipled, venal, cruel, cowardly and treacherous.⁶⁶ He is recognisable the minute he walks on stage, he is the swarthy, cape-enveloped man with a deep voice.⁶⁷ He commits only acts of evil, and does so suitably dressed, with an appropriate manner, in an appropriate setting.⁶⁸

In case we have any doubt about the villain's identity, the other characters frequently set the stage by hinting at his true nature even before he makes an appearance. For example, in *Coelina*, Truguelin's role as the villain is foreshadowed at the start of Act 1, where Coelina and Tiennette express their displeasure at his forthcoming visit. Tiennette says 'I don't care much for these Truguelins; they are envious, deceitful and wicked.' Stephany also refers to them as 'wicked and greedy'. Coelina remembers that her mother warned her to 'beware of the Truguelins; they are capable of anything'.

Although some nautical and domestic melodrama villains are occasionally troubled by their consciences and ask themselves, rather perfunctorily, why they do what they do, generally conscience is uncommon.⁶⁹ More frequently, villains engage in much verbal self-revelation about their wickedness, through gloating

⁶² Connell, above n 58, 42.

⁶³ Connell notes that normative definitions of femininity and masculinity are often found in studies of genres: Ibid 70.

⁶⁴ Booth, above n 17, 18.

⁶⁵ Brooks, above n 4, 38.

⁶⁶ Rahill, above n 45.

⁶⁷ Brooks, above n 4, 17.

⁶⁸ Booth, above n 17, 22.

⁶⁹ Ibid 22 and 78.

soliloquies and confidential asides.⁷⁰ They declare their evil intents and then swiftly execute them.⁷¹

The villain's motives are usually related to the acquisition of money, land, status or the heroine herself. However, given his evil nature, he generally wishes to acquire those things that are morally out of his reach. His wishes are based on treasonable ambitions, sinful loves, or base grudges.⁷² He covets someone else's money and land (e.g. Truguelin in *Coelina*, Fritz in *La femme à deux maris*, and Charles in *Charles le Téméraire*), or a status that he does not deserve (e.g. Macaire in *Le chien de Montargis*, Isuf in *Les ruines de Babylon* and Orsino in *L'homme à trois visages*). When the heroine is the object of his desires, she is usually someone else's beloved or wife (such as Floreska in *Les mines de Pologne* and Rosa in *Rosa*). In this sense, his role is to dissimulate, betray and undo the moral order.⁷³

In doing so, the villain is very active. He thinks, chooses, initiates action, alters his plans, makes new ones, and pursues his desires with relentless single-mindedness.⁷⁴ Rahill has described him as a 'fomentor of conspiracies, deviser of snares, abductor of maidens, persecutor of innocence'⁷⁵ and 'a superman of crime, tireless in iniquity, implacable in vengeance, inexhaustable in evil resource, ingenuity, energy, sublime persistence'.⁷⁶

The villain's strength may be physical, financial or social, but he usually proceeds in his plans with some clear advantage over the other characters. In classical melodrama the power differential between the villain and the heroine was frequently physical, but in later domestic melodrama the villain's power was often financial or social. The upper classes were frequently portrayed as using their power to oppress and seduce.⁷⁷ The villain was often a banker, lawyer, bailiff, steward, squire, or some other mean-souled aristocrat calling up debts from the poverty-stricken, working-class heroine and her family.

⁷⁰ Ibid 22.

⁷¹ Brooks, above n 4, 34.

⁷² Rahill, above n 45, 207.

⁷³ Brooks, above n 4, 33.

⁷⁴ Booth, above n 17, 18.

⁷⁵ Rahill, above n 45, 12.

⁷⁶ Ibid 207.

⁷⁷ Booth, above n 17, 123.

The villain's motivation is usually inadequate compared to the quantity of villainy unleashed.⁷⁸ However, the disproportion between his motivation and actions encourages the audience to recognise the villain as truly evil, as the less motivation can be demonstrated, the more the villain's actions appear volitional, and thus worthy of condemnation.⁷⁹

The villain acts in extreme ways to achieve his desires. He may murder for a relatively small financial gain, destroy an entire village because a resident has insulted him, or ruin an entire family because the daughter does not return his affections. The villain's most extreme actions cause the 'primal scene' of intense trauma, which is instrumental in the villain's ability to confuse the moral universe.⁸⁰ Sometimes this trauma occurs in the past, before the actual performance.⁸¹ In *Coelina*, for example, Truguelin is seen cutting out Francisque's tongue at the beginning of the play, before we are introduced to any of the characters. Although it is not the heroine herself who is injured in this primal scene, Francisque's muteness is the effective barrier to the recognition of Coelina's virtue.

In melodrama, despite the villain's persistence and apparent power, he is constantly thwarted in his plans. He makes mistakes, is not sufficiently cautious, waits too long to take action, or is interrupted at the crucial moment.⁸² Villains suffer contumely, exposure, imprisonment, loss of ill-gotten gains, and violent death at the hands of the hero, comic man, or a benevolent Nature.⁸³ In summary, they receive their comeuppance.

2.3.2 Heroine

Given melodrama's Manichean nature, the main protagonist must be diametrically opposed to the villain and accordingly, represents the embodiment of virtue. Virtue in melodrama is generally represented by a young heroine.⁸⁴ In the same way that the villain's evil nature is identified at the start of the play, the heroine's virtuous nature is made clear when other characters make

⁷⁸ Brooks, above n 4, 33.

⁷⁹ Ibid.

⁸⁰ Ibid 34.

⁸¹ Ibid.

⁸² Booth, above n 17, 23.

⁸³ Ibid 20.

⁸⁴ Brooks, above n 4, 32.

pronouncements about her virtue. We hear about Rosa's virtue before she even appears on the stage, from conversations between her husband and son, and between the villain and his accomplice. In *La fille de l'exilé*, Elisabeth is described as combining courage and energy with constant sweetness, infinite patience, a loving sensitive soul and the candour of an angel.⁸⁵ In summary, she is a 'fine flower of femininity', an impregnable virtuous ingenue, and her virtue has ironclad invincibility.⁸⁶ The heroine is as morally strong as she is physically fragile and weak.⁸⁷

Heroines in melodrama are primarily passive, reactive characters. Accordingly, their conduct with respect to other characters is generally one of obedience and deference. In *Coelina*, the heroine is portrayed as a young woman who is devoted to her guardian and respectfully obedient to him and anyone else who has authority over her. Whenever Coelina acts, it is usually in response to instruction from some other character. For example, she leaves the room as soon as Dufour directs her to do so. When the identity of her real father is revealed, she immediately becomes obedient to him, allowing herself to be led off by him. In the one instance where she appears to act against another character's wishes, it is to thwart the villain and in order to obey her instructions from Francisque. In this example, Truguelin takes a letter written by Francisque and threatens to tear it up before her father can read it. Coelina takes the letter from Truguelin, excusing herself by saying that 'in assuming responsibility for this letter I said that I would return an answer to the one it concerns. Therefore I think it fitting that my uncle read it.' Her subsequent role in the play is little more than an observer to the events going on around her.

Evil reduces virtue to powerlessness.⁸⁸ The passive nature of the heroine is often revealed in the theme of muteness. Muteness is symbolic of the defencelessness of innocence.⁸⁹ Muteness is often metaphoric or representative, for example, the heroine is from another culture and cannot be understood. The heroine's muteness places her in a position in which she needs assistance to demonstrate

⁸⁵ Hyslop, above n 5, 70.

⁸⁶ Rahill, above n 45, 30.

⁸⁷ Hyslop, above n 5, 69.

⁸⁸ Brooks, above n 4, 34.

⁸⁹ Ibid 60.

her virtue. Virtue is unable to 'effectively articulate the cause of the right'.⁹⁰ Her message will often require elucidation by cross-examination or verbal interpretation.⁹¹

The innocent heroine under difficulty frequently succumbs to a melodramatic despair of the world and demonstrates a sense of the hopelessness of things.⁹² Heilman describes melodrama as incorporating a sense of 'innocence neurosis', making one 'always a victim who does not deserve his fate, and who finds it irrational and untimely'.⁹³ In melodrama the innocent victim role is directed towards obtaining sympathy, relieving responsibility and cultivating emotions of compassion.⁹⁴ The heroine is the 'emotional core of melodrama'.⁹⁵ She suffers a great deal, both physically and emotionally. She is far more persecuted than the hero and her suffering is more intense.⁹⁶

In classical melodrama the heroine's passivity in the face of hopelessness obtains its moral power because she is represented in a family or social position that should command protection.⁹⁷ The heroine's relationship with her father-figure is a perfect example of filial piety.⁹⁸ She never calls into question the judgments or actions of her father as this would violate her nature as innocence.⁹⁹ Her weakness is reinforced by the fact that she must ultimately rely on the father figure to judge and recognise her virtue.¹⁰⁰ The role of the father-figure is glorified, and the traditional role of the daughter in the family is reaffirmed.¹⁰¹

2.3.3 Father Figure / Judge

In melodrama the responsibility for judging is that of 'those who should rightfully be the protectors of virtue, especially the older generation of uncles,

⁹⁰ Ibid 31.

⁹¹ Ibid 69.

⁹² Heilman, above n 14, 114.

⁹³ Ibid.

⁹⁴ L Rovner, 'Perpetuating Stigma: Client Identity in Disability Rights Litigation' [2001] *Utah Law Review* 247, 289.

⁹⁵ Booth, above n 17, 30.

⁹⁶ Ibid.

⁹⁷ C Gledhill (ed), *Home Is Where the Heart Is: Studies in Melodrama and the Woman's Film* (1987) 21.

⁹⁸ Brooks, above n 4, 26.

⁹⁹ Ibid 31.

¹⁰⁰ Hyslop, above n 5, 71.

¹⁰¹ Marcoux, above n 15, 3.

guardians and sovereigns'.¹⁰² The father figure in melodrama is frequently the heroine's actual father or guardian, but sometimes a larger scale patriarch, such as a military ruler or king. In Pixérécourt's plays, examples include Dufour in *Coelina*, the Sénéchal in *Le chien de Montargis*, the King in *Les ruines de Babylone*, the Tsar in *La fille de l'exilé*, and the Doge in *L'homme à trois visages*.

The father-figure's role hinges on his duty to protect the heroine. This is usually predicated on social structures giving the male characters some kind of general authority over, or responsibility for the well-being of, the female characters. For example, in *Coelina*, Dufour as Coelina's guardian, has charge of her physical and emotional well-being during her childhood. As Coelina reaches maturity, Dufour becomes responsible for ensuring that she is handed over into the care of a suitable husband, who can take over Dufour's role as her 'protector'. In a sense, when Truguelin's actions put Coelina's virtue in doubt, the practical effect of this is that her right to protection is lost.

The father figure has been described as rather tyrannical, but humane and capable of generosity and mercy in the end.¹⁰³ He is generally a good man and is concerned about appearing to do the right thing. For example, Dufour does not want his agreement to the marriage of Coelina and his son to be seen as motivated by Coelina's valuable dowry. The father figure is frequently 'spouting fashionable humanitarian cant and striking moral attitudes'.¹⁰⁴ However, he is inevitably confused by the villain's trickery and requires assistance from others to clear up the moral universe.¹⁰⁵

The primary role of the judge in melodrama is to dispense justice by recognising virtue – a factual rather than a legal issue. The villain does not manipulate the law, but instead creates confusion about the facts. The judge in melodrama is a finder of fact, rather than of law. The legal rules are presented as evident and inflexible. For example, in *Coelina* according to the law it appears that Coelina is an illegitimate (immoral) child. Accordingly Dufour applies the law, banishing Coelina on this basis. However, his subsequent enquiries, encouraged

¹⁰² Brooks, above n 4, 33.

¹⁰³ Rahill, above n 45, 10.

¹⁰⁴ Ibid 30.

¹⁰⁵ Brooks, above n 4, 20.

and assisted by the doctor Andrevon, reveal that in fact, Coelina falls within the law, in that her parents were married at the time of her birth. This allows Dufour to recognise her factually established virtue. Once the judge recognises virtue in the protagonist, the villain is left 'to the law'. For example, as Truguelin is taken away by the police, Dufour says 'My friends, leave our vengeance to the law. (To the OFFICER) Do your duty.' In *Le chien de Montargis*, Macaire and Landry are also led away by soldiers. The role of the judge is considered further in Chapter 8.

2.3.4 Hero

The hero is generally the devoted and dependable sweetheart or husband of the heroine. The hero may or may not be married to the heroine, although when they are married, it is nearly always happily.¹⁰⁶ The hero is young and virtuous and, although generally passive, he can be strong and courageous when defending his beloved. He is never worsted in a fair fight, but is often outwitted by the villain.¹⁰⁷ For all his good intentions, the hero is rather stupid, and lacks forethought, intelligence, and modesty.¹⁰⁸ He is confused, muddled, and extraordinarily gullible.¹⁰⁹ The hero's practical uselessness is forgiven because his heart is in the right place. He demonstrates this by frequently 'deriding the forces of evil, and uttering moral speeches of which he has large stock'.¹¹⁰ The purity of woman is also a favourite topic of heroes.¹¹¹

The hero is always struggling to escape the predicaments in which the villain lands him. The villain steals his money and property, has him charged with the villain's crimes, imprisons him in some inescapable dungeon, or leaves him lost in a strange land. The hero sometimes attempts some counteraction, but this usually fails.¹¹² In the end the only thing that saves him is usually some sensational and accidental reversal of fortune.¹¹³

¹⁰⁶ *Tékéli, La femme à deux maris, Pizarre, Charles le Téméraire, L'Homme à trois visages, Les Ruines de Babylone ou le massacre des Barmécides*, Rahill, above n 45, 64.

¹⁰⁷ Ibid 31.

¹⁰⁸ Booth, above n 17, 16.

¹⁰⁹ Ibid 18.

¹¹⁰ Ibid 17.

¹¹¹ Ibid 18.

¹¹² Ibid.

¹¹³ Ibid 16.

In a male character, the feminine virtue of unbridled innocence expresses itself in ignorance and immaturity, and is generally seen as a weak and 'unmanly' state of being. As Jeremiah Beaumont says in Robert Penn Warren's *World Enough and Time*: innocence is what man cannot endure and be man.¹¹⁴ For this reason, where the hero is the main protagonist in the story (as opposed to him playing a supporting role to the protagonist heroine) he is often young and the story is about the boy becoming a man. The hero finds his independence and thus his masculinity, and wins (or wins back) the woman he loves.

2.3.5 Other Characters

The hero and heroine are often supported by a comic man and woman who are friends or servants. They are always virtuous characters. The comic man is generally much better at coping with the villain than the hero is, and is frequently entirely responsible for the triumph of virtue.¹¹⁵

Other characters surrounding the heroine include old people and children who reinforce her suffering. For example, an aged parent sorrows for the misery of an erring daughter, and the feeble cries of hungry children fall heavily on the ears of their destitute mother.¹¹⁶ Children are also typically used as the bearers of the sign of innocence.¹¹⁷ Children also act as tests of the other characters' reactions to patent virtue, and are catalysts for virtuous or vicious actions.¹¹⁸

Melodrama also inevitably has a character with a physical disability. Brooks notes that in melodrama, morality has physical repercussions. Extreme physical conditions represent extreme moral and emotional conditions. Blind men, paralytics, and invalids evoke 'the extremism and hyperbole of ethical conflict and manichaeistic struggle.'¹¹⁹ They are striking examples of past misfortunes and mysteries.¹²⁰ In melodrama, the main physical disability is that of muteness. Muteness has a great deal of symbolic significance in melodrama, and accordingly more detailed attention is given to this issue in the following section.

¹¹⁴ Quoted in K Haberlandt, C Berian and J Sandson, 'The Episode Schema in Story Processing' (1980) 19 *Journal of Verbal Learning and Verbal Behaviour* 635, 134.

¹¹⁵ Booth, above n 17, 34.

¹¹⁶ Ibid 30.

¹¹⁷ See examples in Brooks, above n 4, 34.

¹¹⁸ Ibid.

¹¹⁹ Ibid 56.

¹²⁰ Ibid 46. For example, in *Coelina*, Francisque's muteness conceals Truguelin's past villainies.

2.4 The Mute Role

In many of Pixérécourt's melodramas 'les bons' are often struck dumb, unable to express their innermost fears when confronted with the horror of separation or physical danger.¹²¹ Muteness is symbolic of the defencelessness of innocence,¹²² and as such, the mute role is always a virtuous one played by the heroine herself (such as Eloi in *Le chien de Montargis*), or one of her helpers (such as Francisque in *Coelina*). In contrast with the muteness of virtuous characters, the villain never has any difficulty speaking about his actions and intentions. For example, in *Le chien de Montargis* there is a stark contrast between the mute Eloi and the 'literate and talkative villain Macaire and his glib accomplice Landry'.¹²³

Muteness in melodrama can be as a result of a physical inability to speak, a cultural barrier or an imposed silence such as a vow.¹²⁴ Perhaps the most extreme example of muteness in Pixérécourt's plays is that of Dragon the dog in *Le chien de Montargis*. Dragon is the sole witness to the murder, and although his cries lead the others to the site of his master's body, he is unable to name the murderer. Dragon does, however, use canine gestures to attempt to pass on the message that Eloi is innocent and Macaire is the guilty party: he licks Eloi's hands and viciously attacks Macaire. Eloi is the other mute role in the play. He is mute because of a physical inability to speak: when he was younger he fell out of a tree and bit off his tongue. Eloi appears on the circumstantial evidence to be the murderer and is put on trial, but is unable to speak in his own defence. Gestures are inadequate to explain why he has Aubri's papers and a purse full of gold in his possession. In *Coelina*, the mute role is played by Francisque, who also has physically lost his tongue. However, in *Coelina* the circumstances leading to Francisque's muteness are much less innocent, in that his tongue has been cut out by the villain, Truguelin, in a primal scene at the start of the play.

A cultural barrier leading to muteness can be found in Pixérécourt's play *Christophe Colomb*. In that play the American Indians are effectively mute as they do not speak English, and attempted communication with the English speaking characters takes place in the context of confusing gestures and

¹²¹ Marcoux, above n 15, 39.

¹²² Brooks, above n 4, 59.

¹²³ Marcoux, above n 15, 39.

¹²⁴ Brooks, above n 4, 31.

misunderstandings. Brooks also gives a number of examples of melodramas in which the heroine's muteness arises due to a vow. These include *La pie voleuse* by Caigniez and d'Aubigny (in which Annette is willing to die on the scaffold rather than betray her father) and *Clara, ou le malheur et la conscience* by Hubert (in which the heroine cannot defend herself from a charge of infanticide because she has promised silence to the true criminal, her ostensible father).¹²⁵

Whether or not the mute role is played by the heroine or one of her helpers, the mute character is always in need of assistance to demonstrate verbally the heroine's virtue. For example, in *Le chien de Montargis*, Eloi's pantomime of innocence requires the elucidation of cross-examination and the verbal interpretations of Gertrude.¹²⁶ In *Coelina*, Francisque's letter which clears up all the misunderstandings about Coelina's legitimacy is read aloud by Stephany.

Muteness can arise with respect to the inability to prevent the consequences of the villain's conduct. For example, in *Coelina*, Francisque was unable to explain the true circumstances of Coelina's birth prior to Dufour banishing her. The mute role is unable to ask for assistance or oppose the villain. The muteness might be actual, in the sense that the character is unable to speak, or effective, in the sense that although the character can speak, they are unable to be heard. This is inherently tied to the disparity of power between the villain and the character in the mute role.

2.5 The Text of Muteness

The text of muteness can be found in three aspects of melodrama: the mute tableau, mute gesture and the mute role.¹²⁷ The prevalence of muteness in melodrama gives rise to a paradox, since melodrama is primarily concerned with expressing clearly and unambiguously the moral problems with which it deals.¹²⁸ However, Brooks points out that melodrama frequently resorts to non-verbal expressions because words are so often inadequate to represent meanings.¹²⁹ The 'text of muteness' expresses those primal urges, desires and fascinations which

¹²⁵ Ibid.

¹²⁶ Ibid 69.

¹²⁷ Ibid 56.

¹²⁸ Ibid 56.

¹²⁹ Ibid 56.

constitute the very heart of melodrama.¹³⁰ However, as we will see below, in most cases where melodrama relies on non-verbal expressions, they are interpreted by some other means, frequently by the spoken interpretation by another character.

2.5.1 The Mute Tableau

The mute tableau in melodrama has been described as follows:

At the end of each act, one must take care to bring all the characters together in a group, and to place each of them in the attitude that corresponds to the situation of his soul. For example: pain will place a hand on its forehead; despair will tear out its hair, and joy will kick a leg in the air. This general perspective is designed as Tableau. One can sense how agreeable it is for the spectator to take in at a glance the psychological and moral condition of each character. (*Traité du mélodrame*, p.47¹³¹)

The mute tableau is used at moments of climax and crisis, where the silencing of speech and the arresting of the narrative provide a fixed and visual representation of reactions to peripety.¹³² For example, in *Coelina* when Dufour announces that Coelina is not his niece but the child of crime and adultery, there is a tableau of 'stupéfaction générale'. In *La fille de l'exilé* Ivan and the villagers kneel on the mountainside watching Elisabeth, on her knees and holding aloft her cross, float offstage on the plank.¹³³ The tableau is the main dramaturgical device demonstrating melodrama's 'primordial concern to make its signs clear, unambiguous and impressive'.¹³⁴

2.5.2 Mute Gesture

The use of mute gesture in melodrama probably stems from the genre's derivation from pantomime by way of the oxymoronic pantomime dialoguée.¹³⁵ However, mute gesture itself is often inadequate to express certain meanings. For example, in Pixérécourt's play *Le chien de Montargis*, Eloi attempts to

¹³⁰ Marcoux, above n 15, 39 quoting Brooks, above n 4.

¹³¹ Cited in Brooks, above n 4, 61.

¹³² Ibid 61.

¹³³ Ibid 48.

¹³⁴ Ibid.

¹³⁵ Ibid 62.

explain that Aubri gave him his possessions to carry them to Paris to give to his mother. This is almost impossible to convey without words, and his gestures cannot be understood. In order for him to get his message across, other characters are required to cross-examine him and then provide verbal interpretation for the audience.¹³⁶

This problem of imparting meaning by gesture is demonstrated in the tension between the stage directions in a script, the actor's actual gestures and their verbal translation.¹³⁷ In Pixérécourt's plays, the stage directions frequently direct the actor to physically demonstrate some meaning, which is then verbally translated by another character. For example, in *Le chien de Montargis*, Eloi is being questioned about why he possesses Aubri's things:

THE SENESCHAL: But why did you have them? (ELOI indicates that he was to carry them somewhere for AUBRI). You were to take there? But where? And to whom? (ELOI points toward Paris and mimes that he was to deliver them to AUBRI'S mother.)

GONTRAN: Aubri's mother?

Accordingly, 'any specification of the conceptual meaning of the gestural sign must be relayed through the system of articulated language.'¹³⁸ Translation is performed by other people on stage, by the context in which the gesture occurs, and by the spectator, whose interpretations are represented by those messages suggested in the stage directions.¹³⁹

However, in some circumstances, mute gesture in melodrama does not require any verbal translation, particularly when it demonstrates an emotion or moral stance rather than a set of factual circumstances. In many cases gesture is necessary as 'the conventional language of social intercourse has become inadequate to express true emotional valences.'¹⁴⁰ In this sense, mute gesture in melodrama often takes 'the form of the message of innocence and purity', carrying 'immediate, primal spiritual meanings which the language code, in its

¹³⁶ Ibid 69.

¹³⁷ Ibid 70.

¹³⁸ Ibid 71.

¹³⁹ Ibid.

¹⁴⁰ Ibid 66.

demonetization, has obscured, alienated, lost'.¹⁴¹ It expresses meanings that are ineffable, but meaningful in human ethical relationships.¹⁴²

Brooks suggests that the dramaturgy of gesture is 'an effort to recover on the stage something like the mythical primal language, a language of presence, purity, immediacy'.¹⁴³ Brooks draws parallels with Freudian psycho-analysis in the sense that melodrama 'suggests the dream world in its enactments, in its thrust to break through repression and censorship, in its unleashing of the language of desire, its fulfillment of integral psychic needs'. The text of muteness in particular 'suggests expression of needs, desires, states, occulted imperatives below the level of consciousness'.¹⁴⁴

2.5.3 Muteness and Suffering

The heroine is passive in response to her suffering and typically suffers in silence. Rarely does the heroine speak about her suffering, physical or psychological. It is either assumed or another character expresses it for her. Where the heroine does express her suffering, it is generally in the form of soliloquy and not directed at achieving recognition. For example, in *Les ruines de Babylone*, Zaida after being cast out by her brother the king, expresses her anguish at being separated from her husband and son:

I have no more strength left...May my sufferings finally come to an end here! Has there ever been a more deplorable destiny than mine? Oh! No, certainly not; no misfortune can be compared to mine. Yesterday, seated next to the throne, intoxicated by the incense that burned for Jafar, certain of his love and of the existence of my dear Nair, I was the happiest of wives and mothers. Today, reduced to the most wretched state, shamefully driven out of Baghdad, as the vilest of creatures...forever separated from a husband and a son who were massacred almost before my eyes...; without sanctuary, without support, without hope!...What have I left to do in this world?...Dear God! Do not prolong this painful agony; lose no time in reuniting me with those whom I have lost. Do not imitate the unbending severity of Harun. Barbarous brother!...May you never experience for that son whom you

¹⁴¹ Ibid 72.

¹⁴² Ibid 72.

¹⁴³ Ibid 66.

¹⁴⁴ Ibid 80.

cherish so tenderly the cruel anguish to which you, without pity, consign the heart of the unhappy Zaida.

2.6 Melodramatic Suffering

The heroine experiences the unbearable – extremes of pain and anguish.¹⁴⁵ She suffers in ways that we pray that our parents, our friends and ourselves may never suffer.¹⁴⁶ Her suffering is physical and emotional. She is frequently taken from her comfortable home and cast out into the cold. She may be tortured in a dark dungeon, left wretched in a garret, or lost in the snow. She is often left starving, cold, sick and exhausted, without money to buy food, clothes or shelter. Her emotional suffering may be linked to her physical state, but is often also associated with her inability to perform her expected role in society. For example, in *Coelina*, the heroine suffers physically, emotionally and socially. She loses the respect of her guardian and is consequently driven away from her home. She becomes physically exhausted from walking. She suffers financially when she effectively loses her inheritance. She suffers socially as her legitimacy is called into question. Most importantly, she suffers emotionally when she is no longer able to marry the man she loves.

In melodrama, women suffer because of their self-sacrifice and the non-fulfillment of their desires.¹⁴⁷ Their desires are stereotypically feminine. They face typical 'female' problems – social pressures and difficulties with friends, community, lovers or family.¹⁴⁸ The heroine also suffers when her beauty is no longer visible. For example, in *Le ruins de Babylone*, according to the stage directions Zaida appears onstage in the midst of her suffering with 'disordered clothes...those of a woman of the people. She is pale and worn out...'. Coelina, when she arrives at the mill, is 'obviously very tired'.

Given that the heroine's virtue is inherently tied with her domesticity, when she can no longer fulfil her appropriate roles as wife, mother, or daughter, she suffers

¹⁴⁵ Ibid 35.

¹⁴⁶ Ibid 13 quoting Diderot.

¹⁴⁷ L. Jacobs, 'The Women's Picture and the Poetics of Melodrama' (1993) 31 *Camera Obscura* 121, 121.

¹⁴⁸ Byars, above n 59, 18.

terribly. The heroine suffers in her attempts to remain loyal to her husband.¹⁴⁹ Children are often used as a particular source of distress and suffering for the heroine.¹⁵⁰ Pixérécourt encourages his audiences to admire the woman who would suffer anything to protect her children.¹⁵¹ With her virtue in question she is no longer able to provide her children with food, warmth, shelter or the comfort of a secure family. In *Les mines de Pologne*, Floreska and her daughter are kidnapped by the villain Zamoski. In *Rosa*, the heroine and her son have to flee into the wilderness and are later imprisoned in a castle, which burns down, threatening their lives. The heroine also often goes through great suffering in an attempt to restore the honour of her parents. For example, Elisabeth in *La fille de l'exilé* faces physical dangers during her journey to persuade the Tsar of her family's unjust persecution. Where the heroine comes into conflict with her father, it is frequently over her choice of a husband, and as a result of the father's failure to recognise the virtue of the hero whom she loves.¹⁵² For example, *L'Homme à trois visages* in which the heroine comes into conflict with her father, the Doge of Venice, when she defends her falsely accused husband Vivaldi.

When the hero suffers, there are two possibilities. Firstly the hero is portrayed as a very young and innocent boy, in which case he suffers in the same feminine way as the heroine. Alternatively, if the hero is a grown man, his role is usually a very minor one, and he does not feature in much of the action of the play. Adult heroes frequently spend most of the play wandering perilously in distant lands, languishing in prison or rotting in the bandit's secret cave.¹⁵³ When heroes suffer, it is because of an impairment of his masculinity.¹⁵⁴ This impairment often results from the male protagonist being placed in a position of powerlessness. For example in *Coelina*, Stephany is restrained by the peasants when he attempts to follow his beloved against the orders of his father. These

¹⁴⁹ Hyslop, above n 5, 68. However, her struggle to remain loyal is not as a result of her own conflicting temptations. The heroine never voluntarily strays. Instead, she suffers as a result of being the object of the villain's uncontrollable passion.

¹⁵⁰ Booth, above n 17, 32.

¹⁵¹ Hyslop, above n 5, 68.

¹⁵² Ibid 69.

¹⁵³ Booth, above n 17, 17.

¹⁵⁴ Jacobs, above n 147, 121.

different forms of suffering reflect West's notion of gendered injury.¹⁵⁵ The hero's suffering is due to his loss of autonomy. For the heroine, it is the loss of connectedness.

2.7 Melodrama as Moral Instruction

In Martha Nussbaum's work *Love's Knowledge*,¹⁵⁶ she argues persuasively that certain truths about human life, certain aspects of moral philosophy, can only be fittingly and accurately stated in the language and forms characteristic of the narrative artist:

...the selection of genre, formal structures, sentences, vocabulary, of the whole manner of addressing the reader's sense of life – all of this expresses a sense of life and of value, a sense of what matters and what does not, of what learning and communicating are, of life's relations and connections.¹⁵⁷

Linked to the argument that moral philosophy can sometimes be best stated in a particular narrative form (for example a novel or a play) is Bruner's point that all stories have a specific purpose.¹⁵⁸ It follows that, in some cases, a story's purpose can be specifically to provide moral instruction.

Brooks points out that underlying all melodrama is a moral claim, giving the story the nature of parable.¹⁵⁹ He suggests that melodrama has taken the place of the sacred in demonstrating moral and ethical imperatives.¹⁶⁰ In the absence of any more transcendent principles, melodrama provides a creative rhetoric of moral law.¹⁶¹

One of the main purposes of melodramatic stories, at least in Pixérécourt's time, was to provide moral instruction for the people. Pixérécourt agreed with

¹⁵⁵ R West, 'Jurisprudence and Gender' (1988) 55 *University of Chicago Law Review* 1.

¹⁵⁶ M C Nussbaum, *Love's Knowledge: Essays on Philosophy and Literature* (1990).

¹⁵⁷ Ibid 5.

¹⁵⁸ J Bruner, *Making Stories: Law, Literature, Life* (2002) 24.

¹⁵⁹ Brooks, above n 4, 1.

¹⁶⁰ Ibid 15.

¹⁶¹ Ibid 201.

Aristotle that the theatre should instruct as well as entertain.¹⁶² In his 1795 report, he stated that:

morality needs rallying points, where men are drawn to come and hear its lessons. The theatres are there so to speak to present the distillation, the essence of the virtues, either political or personal, which every citizen must profess.¹⁶³

Gabrielle Hyslop explored the intentions and expectations of those who created and defended melodrama after the French revolution. She suggests that one of the things that critics and supporters of melodramas focussed on was melodrama's moral and socio-political influence on audiences.¹⁶⁴ Charles Nodier, an important critic at the time, wrote in the introduction to Pixérécourt's collected works:

I have seen them [the plays] in the absence of organised worship, take the place of the silent pulpit in providing serious and profitable lessons from the souls of his audiences ... Since the people had only the theatre through which to revive their religious and social education, melodrama provided a means of applying the fundamental principles of any civilization, [including] its providential aspects.¹⁶⁵

It seems that this educative function was not accidental. Pixérécourt vigorously defended melodrama because it offered common people instruction which he claimed was morally and politically sound.¹⁶⁶

[Melodrama] offers to that segment of society most in need of good models, acts of heroism, bravery and fidelity. Thus, we show [them] how to become better [people] by demonstrating the noble aspects of the public record...Melodrama will always be a means of instruction for the people because it is an accessible genre.¹⁶⁷

¹⁶² G Hyslop, 'Pixérécourt and the French Melodrama Debate: Instructing Boulevard Theatre Audiences' in J Redmond (ed), *Melodrama* (1992) 61, 63.

¹⁶³ Pixérécourt's report 1795, translated by Hyslop, above n 162, 63.

¹⁶⁴ Ibid 61.

¹⁶⁵ Théâtre Choisi, vol. I, p.111, quoted in J P Marcoux, 'Guilbert De Pixérécourt: The People's Conscience' in Redmond, above n 162, 47.

¹⁶⁶ Hyslop, above n 162, 64.

¹⁶⁷ From an article by Pixérécourt which appeared in 1832, quoted in J P Marcoux, 'Guilbert De Pixérécourt: The People's Conscience' in Redmond, above n 162, 57.

Pixérécourt is said to have had a 'high standard of ethical behaviour'¹⁶⁸ which he incorporated in his melodramas. He described these standards as involving 'ideas of Providence' and 'moral sentiments.'¹⁶⁹

In terms of its function of moral instruction, melodrama has the potential to be hegemonic or subversive. Hyslop notes that in Pixérécourt's time there was much disagreement about whether melodrama reinforced respect for authority or undermined the social hierarchy.¹⁷⁰ She demonstrates how Pixérécourt's play *Rosa* can be read either way. In summary, *Rosa* tells the tale of how a virtuous fisherman's actions result in the death of the lustful landlord who had abducted his wife and child. Hyslop points out that spectators could have read the play as rejecting a vicious feudalism in which the landlord exploited his vassals, or as showing that the stable social order which existed at the beginning of the play was purged of its flaws and restored to its normal state.¹⁷¹

Brooks argues that melodrama is inherently democratic, in that although the villains were powerful and rich, and the heroines were poor, common people, melodrama valued merit rather than privilege, and allowed poor girls to confront their powerful oppressors with the truth about their moral conditions.¹⁷² However, Hyslop makes the significant finding that melodrama is rarely portrayed as encouraging spectators 'to challenge or even question the hierarchical structure of a society which consisted of different groups with different rights, duties and privileges'.¹⁷³

Irrespective of how spectators actually interpreted the messages of Pixérécourt's melodramas, it is apparent from Pixérécourt's own analysis of the form (see above) that he intended his plays to be hegemonic. Other writers seem to support this. Early conservative writers such as de Pongerville defended melodrama on the basis that it achieved that aim, making the public enjoy existing precepts of order and justice.¹⁷⁴ Later critics such as Thomas Elsaesser regarded post-revolutionary melodrama as a coercive tool of the newly empowered ruling

¹⁶⁸ Redmond, above n 162, 54.

¹⁶⁹ Pixérécourt, *Théâtre Choisi*, vol. IV, p.493, quoted in *ibid*.

¹⁷⁰ Hyslop, above n 162, 66.

¹⁷¹ *Ibid*.

¹⁷² Brooks, above n 4.

¹⁷³ Hyslop, above n 162, 66.

¹⁷⁴ *Ibid* 65.

class.¹⁷⁵ Although this may be true, melodrama's coercive nature was subtle, as the existing hegemony was always implicit rather than openly confronted. Existing social structures were simply a background to the moral action.

Melodrama, like all narratives, begins with an ordinary or normal state of things in the world, then deals with something going wrong, and ends by exploring what might be done to restore or cope with the situation.¹⁷⁶ Implicit in this story is an underlying normative message. In melodrama, questions of morality are portrayed as self-evident. Melodrama appears to simply 'uncover' or make legible the underlying moral universe. As such, it makes an implicit statement about social reality and has the potential to wield a certain amount of power by normalization, particularly when held out as a realistic representation of experience.

2.8 Melodrama and Tragedy

In the Introduction I briefly mentioned the fact that the non-litigants' stories tended to fit the genre of tragedy. Although it is impossible to empirically demonstrate whether or not this choice of genre is a cause or a consequence of those peoples' decision not to litigate, the contrast with the litigants' melodramatic stories is worth considering, and forms the basis of some of the tentative conclusions in the final chapter of this thesis. Accordingly, this section explores the main differences between the genre of melodrama and the genre of tragedy.

In everyday conversation, the term 'tragedy' is frequently used fairly loosely and is often used to refer simply to the undesirable consequences of a particular event. However, tragedy as a literary form has a quite distinct meaning. One of the key characteristics of the tragic form is 'dividedness'.¹⁷⁷ Unlike the monopathic characters of melodrama, in tragedy they are internally divided, giving rise to contradictions and inconsistencies.¹⁷⁸ The actions of tragic figures are also constrained by 'different imperatives that correspond to different and perhaps irreconcilable needs and ideals'.¹⁷⁹ These imperatives may take the form

¹⁷⁵ Ibid 67.

¹⁷⁶ Bruner, above n 158, 31.

¹⁷⁷ Heilman, above n 14, 7.

¹⁷⁸ Ibid 7.

¹⁷⁹ Ibid 9.

of an overriding obligation, some divine/moral/civil law, a duty, an honor or simply conscience.¹⁸⁰ An individual's desires and ambitions may come into conflict with these broader considerations, giving rise to 'tragic tension'.¹⁸¹

In tragedy, 'division means choice: there are alternatives, and man must select one or the other.'¹⁸² However, choice requires strength and consciousness. The melodramatic heroine, who is fundamentally weak, unable to make choices, and resigned to her fate, is too weak to become a tragic figure.¹⁸³

Rather than affirming the social order, tragedy 'countenances its contradictions and explores the possibility that conflicts may be neither resolved nor mediated.'¹⁸⁴ While melodrama insists on total victory or defeat, tragedy 'defines life as the paradoxical union of the two'.¹⁸⁵ Tragic narratives 'avoid easy classifications and facile resolutions' and go instead 'beyond good and evil'.¹⁸⁶ The tragic hero is never simply a loser in a social conflict nor a simple victor over evil.¹⁸⁷

Tragedy deals with man's efforts to escape his destiny, and its conclusion is his reunion with destiny.¹⁸⁸ However, tragedy does involve the suffering person finding a mode of recovery¹⁸⁹ by the acceptance of and growth through suffering'.¹⁹⁰ In the tragic view of reality, 'man salvages, from the ruins of the present, the essential human powers on which continuity depends (a quite different thing from a melodramatic victory over an enemy). This may take place whether spiritual regeneration coexists with a new well-being in life...or man lives on in a paradoxical union of suffering and new wisdom...or comes to a new insight before dying...'¹⁹¹ Unlike melodrama, which ends with total victory or total defeat, in the tragic narrative something vital is saved.¹⁹²

¹⁸⁰ Ibid 13.

¹⁸¹ Ibid 9.

¹⁸² Ibid 14.

¹⁸³ Ibid 15.

¹⁸⁴ M Aristodemou, *Law and Literature: Journeys from Her to Eternity* (2000) 32.

¹⁸⁵ Heilman, above n 14, 154.

¹⁸⁶ Aristodemou, above n 184, 65.

¹⁸⁷ Heilman, above n 14, 156.

¹⁸⁸ Ibid 154.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid 18.

¹⁹¹ Ibid 160.

¹⁹² Ibid 157.

2.9 Conclusion

This chapter has provided a detailed overview of the genre of melodrama. Although the term 'melodrama' is difficult to define, in the remainder of this thesis the word will be used to refer to a story with the five constitutive elements discussed in this chapter: moral polarization, overwrought emotion, pathos, non-classical narrative mechanics and sensationalism. The review of a selection of Pixérécourt's plays illustrated how those five elements combine to form a melodramatic plot. These plays will be referred to in later chapters to provide examples of particular aspects of the melodramatic genre, and they will also be compared with the characteristics of the legal injury narrative and some personal injury cases.

This chapter has identified that melodrama's roles are polarized on both gender and moral bases. The heroine role is feminine and virtuous, while the role of villain is typically masculine and inherently evil. Other roles are also either clearly feminine or masculine and virtuous or evil. In melodrama masculine roles are always more powerful than the feminine roles, which are characteristically passive, mute and helpless victims. Accordingly, the feminine characters must depend on the masculine characters, particularly those authority figures such as the judge.

Muteness has been identified as a fundamental characteristic of melodrama, demonstrated in the mute role, mute tableau and the importance of mute gesture. Muteness is representative of the heroine's struggle to communicate her virtue and her suffering. The heroine's suffering is typically feminine: she suffers 'female' problems, particularly relating to her domestic roles as wife, mother or daughter. In contrast, male heroes suffer due to an impairment of their masculinity.

Melodramatic roles are filled by stereotyped and abstract characters, who lack any inner depth or inconsistencies. These roles and characters are normative and melodrama's hegemonic function is strengthened by its aim of providing moral instruction. However, as we have seen in Hyslop's examination of Pixérécourt's plays, melodrama can contribute to the perpetuation of particular values and discourage the audience from challenging existing hierarchical structures in society.

Finally, melodrama was contrasted with the genre of tragedy. Of particular relevance is the identified difference between characteristics of the protagonists in each genre, particularly the tragic characters' more complex nature. The difference between the resolution of the narrative in the two genres is also noteworthy. In later chapters, it will be argued that the melodramatic genre of the legal injury narrative contributes to the poorer health outcomes of litigants. The potential for a tragic genre to provide a different resolution and thus improved health outcomes will be considered.

Bruner notes that it is only 'when we suspect we have the wrong story that we begin asking how a narrative may structure (or distort) our view of how things really are.'¹⁹³ The following chapters examine the legal injury narrative with Bruner's enquiry in mind. They ask: Does the legal injury narrative tell the wrong story? Does it structure a particular way of viewing injury? Does it distort 'how things really are'? They explore what the melodramatic genre of the legal injury narrative reveals and disguises about what is valued with respect to life, particularly an injured person's life. They also identify hidden values underlying the narrative's representations of morality and virtue, blame, standards of behaviour, proof and reward.

¹⁹³ Bruner, above n 158, 9.

Chapter 3

The Legal Injury Narrative

Introduction

In this chapter I explore how the legal injury narrative fits the genre of melodrama using the definition of melodrama developed in the previous chapter. This discussion forms the foundation for my later critical analysis of the possible consequences and implications of the melodramatic nature of particular aspects of the legal injury narrative.

I first demonstrate that the legal injury narrative evidences the five elements of the melodramatic genre: moral polarization, overwrought emotion, pathos, non-classical narrative mechanics, and sensationalism. I then provide a detailed examination of the legal injury narrative's role and characters, and show how they reflect the typical roles and characters in melodrama. In the following section I explain how the melodramatic text of muteness is revealed in the legal injury narrative, with particular emphasis on the application of the text in a courtroom setting, and the paradox it gives rise to in relation to proof of the plaintiff's suffering. In the final section of the chapter I explore the effect of the legal injury narrative as the basis of moral imperatives and its role in creating and reinforcing certain normative aspects of the status quo.

3.1 How is the Legal Injury Narrative Melodramatic?

In its broadest sense, the legal injury narrative is melodramatic in that it dramatises the ordinary kinds of misfortunes that everyday people experience in their lives.¹ It deals with familiar situations, settings and characters² and responds to the topical social issues of the day – fear of accidents, concerns about health and well-being, financial security, employment, globalisation and big business, the problems of social security and health care, and the breakdown of families. Melodrama and the legal injury narrative both attempt to give meaning to undeserved suffering in a complex world. The legal injury narrative also

¹ P Brooks, *The Melodramatic Imagination* (1976) 13.

² M R Booth, *English Melodrama* (1965) 120.

reflects particular characteristics of the genre, including plot structure, character types and moral imperatives. How each of the five constitutive elements of melodrama are manifested in the legal injury narrative will now be examined.

3.1.1 Moral Polarization

In the legal injury narrative the plaintiff and the defendant are diametrically opposed – this is inherent in the adversarial system of litigation. Just as in melodrama, in the legal injury narrative we have certain expectations about the plaintiff's and the defendant's characters before the trial begins. For a start, the case is identified as *Plaintiff v Defendant*. Simply by being named as the person or entity against whom the action is brought, the defendant is cast in a particular role. We know that the plaintiffs and their lawyers believe that they have reasonable prospects of proving the defendants were negligent. Why else would they be engaging in the costly event of a trial?³ We know that the plaintiff's story is going to be one about how the defendant caused undeserved injuries and suffering. The scene is already set for a demonstration of the defendant's villainous actions and the plaintiff's virtue in peril. Although the plaintiff and defendant are not expressly characterised as morally good and evil in the same way the heroine and villain are portrayed in melodrama, the legal injury narrative implicitly encourages this personal moral polarisation.⁴

Feigenson uses the case of *Faverty v McDonald's Restaurants of Oregon Inc.*⁵ to demonstrate the polarization of characters in a personal injury trial.⁶ Theurer was an eighteen year old student employed by McDonald's. He had worked the 3.30pm to 7.30pm shift, then returned to do a midnight shift that same night. As he drove home, very tired, at 8am the next morning, he fell asleep at the wheel and hit the truck driven by Faverty. Faverty was seriously injured and Theurer was killed. Faverty settled with Theurer's estate and sued McDonald's. Technically in this case Faverty, as the plaintiff, should have been cast as the

³ Of course, there is still room for a variation of the legal injury narrative – one based on the peripety of role reversals. For example, we all know of the villains who masquerade as heroines, the plaintiffs who do not have a genuine claim but attempt to manipulate the narrative in order to make a financial gain.

⁴ This moral characterisation of plaintiff and defendant is discussed in more detail in Chapters 5 and 7.

⁵ 892 P.2d 703 (Or. Ct. App. 1995).

⁶ N R Feigenson, 'Legal Meaning in the Age of Images: Accidents as Melodrama' (1999/2000) 43 *New York Law School Law Review* 741, 762.

virtuous character. However, in order to succeed in his claim he had to, in effect, argue Theurer's case for him. He had to show that it was McDonald's fault that Theurer was on the road in an over-tired condition.⁷

In essence, Faverty argued that McDonald's should be held responsible for allowing Theurer to work such long shifts and then drive home. Faverty's lawyer clearly set up a 'good guy / bad guy' character opposition. Theurer was described as 'a good kid. Everybody liked him. All the terrible things that kids can get involved in and exposed to, he'd done a good job of avoiding most of them'. Faverty argued that McDonald's 'should have known better' than to keep Theurer at work, and that in doing so McDonald's acted against 'common sense' and 'common decency'. The plaintiff's lawyer's explanation about why McDonald's failed to take steps to protect its employee was firmly based on the portrayal of McDonald's as a greedy corporate entity who 'pushed the kid off a cliff'. Inherent in this character stereotype is the fact that McDonald's was more interested in making money than taking care of its employees.⁸

The Manichean contrast in the legal injury narrative is evidenced in the individual legal injury stories told in Australian cases. For example, in *Lonsdale v Smith*⁹ the distinction between the characters of the plaintiff and defendant was made very clear by the judge, even though the circumstances of the accident were not particularly malicious. The plaintiff had agreed to give the defendant, who had been drinking, a lift home. The defendant then invited the plaintiff to come and see his new workshop and car inspection pit. Due largely to the lack of light and inadequate barriers, the plaintiff fell into the pit and was injured. However, the interesting aspect of the judgment was the clear reiteration of the fact that in the events leading up to the accident, the plaintiff was motivated by courtesy and resignation (praiseworthy characteristics), whereas the defendant was motivated by pride which was exacerbated by the consumption of alcohol (both the emotion and the alcohol consumption worthy of condemnation).

⁷ In a way the case emphasizes Faverty's good, passive and mute status in that he is very rarely even mentioned in the arguments. These attributes of the plaintiff role are discussed in detail in Chapter 6.

⁸ See discussion in Feigenson, above n 6.

⁹ [2000] ACTSC 15.

Another good example of the ‘good girl’ / ‘bad guy’ dichotomy can be found in *The Australian Capital Territory v Cindy Van der Gevel and the Nominal Defendant*.¹⁰ Ms Van der Gevel was walking along a road when a car swerved towards her, causing her to step over a guard rail and fall into a culvert, suffering injury. She brought an action against the Nominal Defendant (in place of the unidentified driver of the oncoming car) and the Australian Capital Territory (as the relevant road authority). Her case emphasized the inappropriate behaviour of the men in the oncoming car and her entirely understandable response. The driver of the oncoming car was described by the judge as ‘menacing’ and ‘malicious’. Even the car itself developed a villainous personality, described as an ‘errant motor vehicle’.

The road authority was also interested in laying blame for the incident on the occupants of the car and presented their argument in clearly moralistic terms, stating that the accident was:

precipitated by the **completely unjustifiable** actions of a group of young men shouting and waving in an **errant motor vehicle** that they aimed at the plaintiff¹¹

and that:

the action of the driver and passengers in the car was **without any justification**, was almost certainly **intended to frighten the plaintiff**, had **no redeeming social value of any kind** and would be **condemned by right thinking people**.¹²

Gallop ACJ and Higgins J, in their judgments, accepted and reinforced the contrast between the actions of the men driving the car and Ms Van Der Gevel. Both judges clearly indicated their approval of Ms Van der Gevel’s state of mind and subsequent actions.

The plaintiff was walking alongside a steel guard barrier when a car containing a group of young men approached, slowed down and weaved towards her. The plaintiff, a young woman alone on a lonely stretch of

¹⁰ [1998] ACTSC 118.

¹¹ Ibid, para 26, my emphasis.

¹² Ibid, para 27, my emphasis.

road at night, understandably feared for her safety and decided to step over the guard barrier to avoid the oncoming vehicle.¹³

At this precise point, the plaintiff was approached by a vehicle containing a number of young men. The car slowed and weaved towards her. The occupants were jeering and yelling. Some were waving their arms about. Being understandably alarmed, the plaintiff stepped over the guard-rail. She expected to find herself on a grassy slope down which the car could not follow her. Instead she found a void into which she toppled. She was seriously injured.¹⁴

As these examples reveal, the characterisation of the plaintiff and defendant according to assessments of morality, and their polarisation, is often implicit in the comments made by lawyers and judges in the course of the trial.

3.1.2 Overwrought Emotion and Pathos

Feigenson points out that there is an obvious distinction between a melodramatic performance and the melodrama of the accident narrative in that, in the latter, the level of emotion needs to be toned down.¹⁵ This is because the 'normal' discourse of law disallows the language of emotion and experience.¹⁶ John Noonan, in *Persons and Masks of the Law*, takes this point to the extreme, suggesting that the law has separated itself from human experience.¹⁷ Henderson also goes so far as to state that legal decision making frequently has nothing to do with understanding human experiences, affect and suffering.¹⁸ However, personal injury litigation is, at least in theory, the epitome of individualised justice, in which the effect of the injury on the particular plaintiff, in his or her particular circumstances, is specifically in issue. Accordingly, there is broader scope for the role of emotions than in other areas of law, even though the demonstration of emotions may be somewhat muted by the type of language used in the legal injury narrative (compared with the often extravagant and indulgent language used in classical melodramatic theatre).

¹³ Gallop ACJ, para 6.

¹⁴ Higgins J, para 5.

¹⁵ Feigenson, above n 6, 748.

¹⁶ L N Henderson, 'Legality and Empathy' (1987) 85 *Michigan Law Review* 1574, 1575.

¹⁷ J T Noonan, *Persons and Masks of the Law: Cardozo, Holmes, Jefferson and Wythe as Makers of the Masks* (1976).

¹⁸ Henderson, above n 16, 1574.

In the legal injury narrative the emotion is inherently linked to pathos. Pathos is based on the melodramatic requirement that the plaintiff must suffer, and must not deserve that suffering. If the audience (and particularly the decision maker) does not feel pity and sadness in response to the plaintiff's claims of suffering, the plaintiff is unlikely to succeed in his or her claim for compensation. This is because the plaintiff will either be seen not to suffer, or alternatively the plaintiff's suffering will be seen to be deserved.¹⁹ The plaintiff needs to encourage feelings of empathy in order for the decision maker to recognise the plaintiff's pain and suffering.²⁰ This is usually achieved by the plaintiff demonstrating as clearly as possible the details and extent of his or her suffering. The plaintiff's 'victim's narrative' is thus seen as a fundamental part of the case.²¹

In criminal cases victim impact statements are victims' stories about the effect of the events on them and their families, aimed at giving the trier of fact an opportunity to exercise compassion in the legal context.²² Bandes acknowledges that the use of victim impact statements is controversial and raises difficult questions about the use of compassion, empathy and narrative in various legal contexts.²³ She argues that in criminal cases, the use of victim impact statements can appeal to hatred, the desire for undifferentiated vengeance and even bigotry, rather than encouraging compassion.²⁴ In the legal injury narrative victim narratives may also lead to hatred and vengeance against the defendant, with disturbing consequences.

Provided that the plaintiff has been able to communicate his or her undeserved suffering and the decision maker empathises, the plaintiff then becomes 'the central object of the audience's emotional participation in the story.'²⁵ Ideally, this leads to feelings of sympathy, which motivate the decision maker to take

¹⁹ See further discussion in Chapters 6 and 7.

²⁰ Henderson, above n 16, 1575.

²¹ Ibid 407. S Bandes, 'Empathy, Narrative and Victim Impact Statements' (1996) 63 *University of Chicago Law Review* 361. See also G P Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials* (1995) 201.

²² Ibid 362.

²³ Ibid 362-363.

²⁴ Ibid 365.

²⁵ Feigenson, above n 6, 746.

action to alleviate the plaintiff's suffering.²⁶ Feigenson explains that sympathy goes a step further than empathy in that it 'includes the cognitive appraisal that the sufferer does not deserve his suffering and the desire to help relieve that suffering for the sufferer's sake'.²⁷ In the legal injury narrative, it is this distress response that the plaintiff seeks to trigger in the decision maker, leading to the action of awarding damages as compensation for the plaintiff's suffering.

The legitimacy of the plaintiff's victim narrative in encouraging pathos and empathy, and the consequences of adopting this narrative from the injured plaintiff's perspective are important issues. A particular concern arises from the fact that the plaintiff must demonstrate that her or his suffering is undeserved. This may result in the plaintiff's narrative drawing on 'stock victim imagery, as well as permitting and encouraging invidious distinctions between the personal worth of victims'.²⁸

3.1.3 Nonclassical Narrative Mechanics

The three acts in the typical melodramatic plot are reflected in the legal injury narrative. The first act relates to the time before the injury, portraying the plaintiff in a state of physical wholeness and emotional happiness. The primal scene occurs when the plaintiff is injured as a result of the defendant's actions, and his or her life transforms into one of extreme suffering. The final act involves the trial in which the plaintiff's 'virtue' is recognised and rewarded and the defendant receives his comeuppance.

The basic plot of the legal injury narrative fits the following framework: The plaintiff, ideally characterised as inherently good, suffers as the result of an injury caused by the acts or omissions of the defendant, who is characterised as inherently bad. The injury results in the plaintiff's previously good life completely transforming into a life typified by pain and suffering. The plaintiff consequently feels dissatisfaction with life and resignation to his or her fate. The plaintiff and defendant are linked in a relationship of complementarity in that the defendant is portrayed as highly blameworthy and the plaintiff as not at all

²⁶ N R Feigenson, 'Sympathy and Legal Judgment: A Psychological Analysis' (1997) 65 *Tennessee Law Review* 1.

²⁷ Ibid 12.

²⁸ S Bandes, 'Empathy, Narrative and Victim Impact Statements' (1996) 63 *University of Chicago Law Review* 361, 405-406.

blameworthy. The plaintiff makes a public demonstration of virtue and undeserved suffering and the defendant is publicly judged and condemned. The plaintiff is then compensated and justice is served. In order to construct this plot, events need to be selectively included and simplified. This is most evident in the way in which the legal injury narrative attributes blame.

3.1.4 Sensationalism

The somewhat sterile environment of the courtroom is not inherently conducive to overt sensationalism. There are no live horses or fire engines. However, courtrooms and trials have their own particular type of sensationalism, based in the performances and rituals taking place inside them. The design of many courtrooms (with rich colours and stained wood panelling) and the formalities of who may fill the various parts of the courtroom (judges on the bench, lawyers at the bar table) make the environment akin to a stage and the people on it at any given time subject to stage-direction. The standard characters in the courtroom also have particular costumes, some of which may well be described as sensational. Lawyers and judges wear robes, wigs, and jabots or collars. Court officers frequently wear military-style uniforms. Prisoners may wear standard dull prison garb.

Considering courtrooms as theatres is not particularly novel, given that both courtroom and theatres share common origins in the 'agoras' of Classical Greece and the 'forums' of Ancient Rome. The existence and popularity of television series and movies based around the courtroom²⁹, televised trials like that of OJ Simpson, and live-feeds of court TV are also evidence of the continuing spectacle and entertainment value of courtroom trials.

Along with the trial's performative rituals, such as the requirement for everyone present to rise when the judge enters, there are also overt performances by lawyers, witnesses and judges during the trial. These performances often intentionally call upon popular cinematic stories.³⁰ Within the trial itself, computerised accident reconstructions and surveillance videos of the plaintiff

²⁹ For example, see television series such as *Perry Mason*, *LA Law*, *Rumpole of the Bailey*, *Judge Judy*, *Ally McBeal*, and *The Practice*. For a compilation of movies with significant courtroom scenes see K Laster, *The Drama of the Courtroom* (2000).

³⁰ P N Meyer, 'Making the Narrative Move: Observations Based Upon Reading Gerry Spence's Closing Argument in the Estate of Karen Silkwood V. Kerr-Mcgee Inc.' (2002) 9 *Clinical Law Review* 229.

carrying out unexpected and active tasks also contribute to the sensationalism of the trial.

Aristodemou suggests that the machinery of the trial ‘serves to mystify law’s sources of power which relies not only on logos and reason but on the power of the spectacle, on non-linguistic signs and images’.³¹ In the legal injury narrative law’s power is revealed in many ways, including in the text of muteness and the narrative’s function as moral instruction.

3.2 Roles and Characters

‘When individuals come before a court, they do not present themselves as they would in everyday life; instead, they come before the court in one of their roles.’³²

The legal injury narrative roles correlate to the standard roles in classical melodrama: the defendant is the villain, the plaintiff is the heroine, the judge presides as father-figure, the lawyers act as the heroine’s assistants and the villain’s henchmen, the doctors and other experts are the authoritative truth-tellers. The roles are also typically filled by ‘characters’³³ who are either virtuous or evil.

The role of plaintiff is ideally filled by a virtuous character, although there are plot variations in which the role is filled by an ‘against-type’ character. Virtuous characters also usually play the roles of judge, the plaintiff’s lawyer and experts. The defendant role is filled by the main evil character.

³¹ M Aristodemou, *Law and Literature: Journeys from Her to Eternity* (2000) 65.

³² K Bumiller, *The Civil Rights Society: The Social Construction of Victims* (1988) 62.

³³ In this thesis my use of the word “character” with respect to the legal injury narrative broadly incorporates Noonan’s concept of masks and Bumiller’s concept of legal identity. In J T Noonan, *Persons and Masks of the Law: Cardozo, Holmes, Jefferson and Wythe as Makers of the Masks* (1976) 20, Noonan proposes that individuals who are involved with the law (be they judges, lawyers, or litigants) are subsumed behind legal constructs which suppress their humanity. He calls these constructs “masks” because this metaphor emphasizes the fact that many of our most “human” emotions are displayed on our faces. He contrasts masks with what he calls “roles” (such as judge, lawmaker, or litigant) because role-players “have not been identified with those parts”. Bumiller describes a similar concept she calls “legal identities”. (Bumiller, *ibid* 62) These are the “social constructions that courts apply to recognize the role of the litigants”. (Bumiller, *ibid* 60) She notes that these identities often hide the narratives of the individuals who are directly involved in the legal process as they are required to come before the court in one of the recognised roles. (Bumiller, *ibid* 62) Accordingly, my use of the term “character” does not simply describe a position which the role-player has been assigned to carry out by society. It refers to the role-player’s character in the narrative incorporating the associated moral constraints.

The characters who fill these roles can vary, but are usually based on stereotypes, determined by peoples' position or circumstances.³⁴ For example, legal narratives may treat '...black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational and probably destitute'.³⁵ This kind of characterisation tends to be imposed over and limit the information provided about the individuals' identities, experiences, perspectives and images.³⁶ In many cases, the characterisation may contradict an individual's own concept of the part they have played in the events in question. For example, in order to make a successful sex-based claim, women are often required to represent themselves as victims, although this may contradict their experience.³⁷ Bandes cautions that in some cases victims' narratives may not be true to the victims' experience.³⁸ This appears to be a significant risk in personal injury cases, where the legal injury narrative casts the injured plaintiff in a particularly restricted role.

Peoples' relationships are also often stereotyped in legal narratives, such as in the reoccurring themes of poor client / state and oppressor / victim. Consistent with law's tendency towards binary systems of logic, the relationships between characters in legal narratives tend to be defined in oppositional terms.³⁹ This is also typical of the melodramatic form, in which relationships are generally based on the characters' polarized differences, particularly with respect to their gender and moral nature.

Given that melodramatic narratives tend to explain peoples' actions by reference to their characters, the representation of a character's moral nature is used to explain his or her actions. Legal narratives contain similarly preconceived ideas about peoples' expectations and motivations. For example, in legal narratives relating to welfare law, there is a clear distinction between the worthy poor, who are morally virtuous (for example the disabled, blind and elderly) and the unworthy poor (such as nonworking 'employable' single people and heads of

³⁴ C P Gilkerson, 'Theoretics of Practice: The Integration of Progressive Thought and Action: Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories' (1992) 43 *Hastings Law Journal* 861, 867.

³⁵ P J Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (1991) 147.

³⁶ Gilkerson, above n 34, 872.

³⁷ Ibid 875.

³⁸ Ibid 405-406.

³⁹ C Smart, *Feminism and the Power of Law* (1989) 33.

households), who are morally reprehensible.⁴⁰ Similar stereotypes are found in the legal injury narrative.

The common characters who fill the two main legal injury narrative roles are those we all recognise. Plaintiffs are often characterised as:

- The Aussie battler. For example *Loiterton v PD Mulligan Pty Ltd & anor*⁴¹ in which the trial judge commented: 'I am satisfied that the plaintiff had been a hard worker all of his life. He gave evidence that he had always been able to work, and had never been on the dole.'
- The hard working immigrant. For example *Koznjak v Andreco-Hurll Refractory Services Pty Ltd & Anor*⁴² in which the judge found: 'There is no question that the plaintiff has been a hard worker all of his life.'
- The lazy malingerer. For example in *Newberry v Parojam Pty Ltd (Trading as P&R Deguara)* Thomas JA and Jones J described the plaintiff as someone who had: 'greatly exaggerated his description of pain, and [had] adopted an abnormal gait... When he did seek attention...he set about trying to convince doctors that there was something wrong with him...Mr Newberry was not wanting pain relief. Rather he was committed to exaggerating his symptoms'.⁴³
- The malingering immigrant, such as the plaintiff in *Risteska v The Commonwealth of Australia*. Miles CJ was of the opinion that 'the plaintiff's reaction to her injury was a result of personal, social and cultural factors...as the immediate and not very serious results of the injury wore off her concern for her future grew and she began to exaggerate her symptoms'.⁴⁴
- The pitiable invalid, such as the portrayal of the plaintiff Tanya in *Hornberg v Horrobin*, a twenty-two year old woman in need of daily medical care and who was at risk of marriage breakdown (in the unlikely

⁴⁰ Gilkerson, above n 34, 884.

⁴¹ [2000] ACTSC 36.

⁴² [2000] ACTSC 10.

⁴³ [1998] QLDSC 3251.

⁴⁴ [1999] ACTSC 56.

event that she found a partner) and who was now practically unable to fulfil the role of mother.⁴⁵

Typical defendants include:

- The money-hungry employer, such as the hotel management in *Rosstown Holding Pty Ltd t/as Rosstown Hotel v Mallinson*⁴⁶, who, despite a known risks to employees, instituted a dangerous system of work simply because it was the cheapest option.
- The lazy statutory authority, such as the Council in *Forbes Shire Council v Jones*, whose employee had neglected his duty to inspect the work on the footpath at least once a day, thus failing to discover the broken and dangerous pipe before the plaintiff's accident.⁴⁷
- The erratic driver, see for example, *Australian Capital Territory v Cindy Van der Gevel and the Nominal Defendant*⁴⁸, discussed above, and *Acosta v Chegwin*⁴⁹, discussed in Chapter 4.
- The unsafe property owner, such as the defendant in *Lonsdale v Smith*⁵⁰, discussed above.
- The careless manufacturer, such as the defendant in *Moylan & Ors v The Nutrasweet Company & Ors*⁵¹ who had negligently designed an IUD device and then failed to warn women of the dangers associated with its use of which the defendant was aware.

The parties' lawyers might be also be stereotyped, as the 'defendant lawyer' working for large firms and representing insurance companies or the bleeding-heart and poorly paid plaintiff lawyer.

Where the characters behave inconsistently or unexpectedly, the narrative becomes confused and often a re-casting is required. In the typical peripety of melodrama, the plaintiff may turn out to be the true villain in the narrative.

⁴⁵ CA No 10477 of 1997 unreported decision of 18 September 1998.

⁴⁶ [2000] VSCA 166.

⁴⁷ [1999] NSWCA 419.

⁴⁸ [1998] ACTSC 118.

⁴⁹ (1998) NSW SC CA 40011/97.

⁵⁰ [2000] ACTSC 15.

⁵¹ [2000] NSWCA 337.

Defendants often attempt to use this role reversal, arguing that plaintiffs are guilty of malingering or exaggeration, or that they have a history of past accidents or illnesses. Where the plaintiff turns out to be the villain, the plaintiff's lawyer may also be recast, for example as an ambulance-chasing plaintiff lawyer.

The roles of defendant, judge, lawyers and experts have typically masculine qualities, whether or not the characters cast in these roles are virtuous or evil. In contrast the role of plaintiff is typically feminine. Each of the main roles and the sorts of characters who fill those roles are discussed in more detail in the following chapters.

3.3 The Text of Muteness

A personal injury trial is, to adapt Brooks's description of melodrama, primarily concerned with expressing clearly and unambiguously the problems with which it deals. In the trial, as in melodrama, everything must be spoken.⁵² Even demonstrative evidence such as gesture must be described for the record. The lawyers orally address the court, the witnesses give oral evidence, and the judge 'reads' the judgment.

Despite the apparent emphasis on the spoken word in the personal injury trial, the legal injury narrative is still founded on the text of muteness. It is evident in the mute tableau and the importance of mute gesture. However, the text of muteness is most apparent with respect to the plaintiff's mute role in the narrative.

3.3.1 The Mute Tableau

In the personal injury trial, the mute tableau is represented by the moment at the beginning and end of each sitting, where the court officer announces 'Silence, all stand!' and all present in the court stand still and mute in the moment before the judge enters or leaves the room. Although the participants in the trial may not be as emotionally demonstrative as the characters in melodrama, in a sense their positions in the tableau are representative of their 'legal' condition. The judge will be behind the bench, on a raised platform, symbolising his high moral and authoritative standing. The lawyers will be at the bar table, and beside or behind

⁵² Or at the very least, spoken *about* or explained (for example the relevance of films, photographs, diagrams, etc).

them will be their clients. The witness will be in the witness box. Any spectators will be in the public gallery. It is interesting to note that, unless they are giving evidence, the plaintiff and defendant have no particular position, other than somewhere close at hand to their lawyers. This also highlights the parties' reliance on their lawyers as their spokespersons and to some extent the parties' own powerlessness in the proceedings.

3.3.2 Mute Gesture

In the courtroom, as on the melodramatic stage, gestures must frequently be interpreted and verbalised before they can be understood. Eloi's difficulties in explaining himself by gesture in *Le chien de Montargis*⁵³ are reflected in the following example of a typical exchange between lawyer and witness in a trial:

COUNSEL: How tall was the man you saw leaving the property?

WITNESS: About this tall. (Witness holds her hand up in the air).

COUNSEL: For the record, the witness is indicating a height of about six feet.

However, as in melodrama, gestures in the courtroom frequently demonstrate deep emotions and matters that are simply inexpressible in words. As Shoshana Felman discusses in her article *A Ghost in the House of Justice: Death and the Language of the Law*⁵⁴, physical gesture can point to a meaning that cannot be articulated.⁵⁵ The article is about the event of a witness fainting on the stand at the Eichmann trial.⁵⁶ The witness's name was Dinoor and he was a survivor of Auschwitz. He adopted the name of K-Zetnik, a slang word representing a concentration camp inmate not identified by name. As he was responding to a question about why he took this pen-name, his testimony drifted off as he apparently began visualising some of the horrific events to which he was a witness. He failed to respond to a request from the prosecutor to answer further

⁵³ See paragraph 2.2.2 above.

⁵⁴ S Felman, 'Reading Legal Events: A Ghost in the House of Justice: Death and the Language of Law' (2001) 13 *Yale Journal of Law and the Humanities* 241.

⁵⁵ Ibid 278.

⁵⁶ Adolf Eichmann was charged under a 1950 Israeli law enacted to punish Nazis and their collaborators. Eichmann was responsible for the Nazi "Final Solution", pursuant to which millions of Jews were rounded up, placed in ghettos and concentration camps, and murdered. His trial was controversial and highly publicised. It lasted from 2 April to 14 August 1961. Eichmann was sentenced to death and executed in Ramleh Prison on 31 May 1962. Criminal Case 40/61 (Jerusalem), *Attorney General v Eichmann* (1961).

questions and the judge intervened, insisting that the witness listen to the questions. At this point the witness fainted and plunged into a deep coma, after which he spent two weeks in hospital in a paralytic stroke.

Felman quotes the poet Haim Gouri who covered the trial:

What happened here was the inevitable. [K-Zetnik's] desperate attempt to transgress the legal channel and to return to the planet of the ashes in order to bring it to us was too terrifying an experience for him. He broke down... Others spoke here for days and days, and told us each his story from the bottom up ... He tried to depart from the quintessential generalization, tried to define, like a meteor, the essence of that world. He tried to find the shortest way between the two planets among which his life had passed... Or maybe he caught a glimpse of Eichmann all of a sudden and his soul was short-circuited into darkness, all the lights going out. ... In a way he had said everything. Whatever he was going to say later was, it turns out, superfluous detail.⁵⁷

The event demonstrates a number of aspects of the 'text of muteness' in the context of a trial. Firstly, the trial procedure became interrupted when K-Zetnik started to speak a language that was unfamiliar to the others in the court. His 'irruption of irrationality through a delirious rambling'⁵⁸ was nonsensical to the prosecutor and the judge. However, as Felman's analysis demonstrates, the physical gesture of the faint expressed what could not be verbalised in language. It illustrated 'the profound pathos of a cognitive abyss abruptly opened up inside the courtroom and materialized in the unconscious body of the witness'.⁵⁹

The need for verbalisation of meaning is also demonstrated on a much larger scale in the Eichmann trial. Felman explains how the prosecution in the Eichmann case had to decide whether to rely upon living witnesses or upon documents for proof of the case. She reports that the prosecutor decided to add living witnesses because he wanted to not only establish facts, but also to 'transmit truth as event and as the shock of an encounter with events, transmit

⁵⁷ Felman, above n 54, 248.

⁵⁸ Ibid 254.

⁵⁹ Ibid.

history as an experience'.⁶⁰ In a sense, the documents could not in themselves communicate these 'thought-defying' facts. Although muteness in a courtroom is normally devoid of meaning, sometimes it is the physical presence of the legally mute body that gives rise to the pathos.⁶¹

As well as expressing what cannot be articulated, mute gesture can also corroborate spoken claims and indicate truthfulness. The legal system relies on a number of methods to identify deceit, including cross-examination of witnesses, the requirement of witnesses to swear an oath or affirm the truthfulness of their testimony, and the opportunity of the decision maker to observe the demeanor of testifying witnesses.⁶² This ties in with the text of muteness in that gestures are important in assessing the credibility of a personal injury plaintiff. These may include gestures generally believed to be indicative of deceit, such as touching the mouth while talking or avoiding eye contact, and specific pain behaviour, such as grimacing, guarding or bracing. In some cases where malingering is suspected, a psychologist or psychiatrist may also undertake behavioural evaluation of the plaintiff. These experts then provide a verbal interpretation of the plaintiff's gestures.

Gesture may also be indicative of a lack of truthfulness. In *Risteska v The Commonwealth of Australia*⁶³ the defendant alleged that the plaintiff was exaggerating or feigning her disabilities. Miles CJ did not find the plaintiff a convincing witness, explaining:

The presentation of the plaintiff in the witness box was that of a person who was on some matters of importance not telling the truth. Dr Knox thought that she displayed genuine pain in the back. On the contrary, it appeared to me that it was only when her attention was directed to her back that she displayed pain and a conclusion that she was at least exaggerating, was inevitable ... The plaintiff appeared to approach and leave the witness box with a limp. She did not exhibit any physical problems in the witness box

⁶⁰ Ibid 243.

⁶¹ Ibid 266.

⁶² S I Friedland, 'Law, Science and Malingering' (1998) 30 *Arizona State Law Journal* 337, 344.

⁶³ [1999] ACTSC 56.

until she started to describe the condition in her back. She then made gestures appropriate to back pain.⁶⁴

Accordingly, the manner and timing of gesture is also important and may lead to different interpretations of meaning.

Gestures of pain are also important. In many cases the credibility of personal injury plaintiffs is called into question when they are seen to be too physically active after suffering injury. This is because their physical gestures are not consistent with their allegations of pain and suffering. For example, a plaintiff who is allegedly suffering extreme back pain may be filmed (during surveillance by a private investigator) carrying out activities such as carrying heavy bags of shopping. These kinds of activities may lead to the plaintiff being categorised as an 'overcomer'⁶⁵ and accordingly being seen as not suffering enough. The usual response to this kind of exposé is the plaintiff admitting that they undertook those activities, but that it resulted in the plaintiff suffering from an increase in pain. This is often not accepted unless there is gestural evidence (for example, the plaintiff grimacing as she lifts the bags and stretching gingerly after putting them down).

The theme of the text of muteness in the legal injury narrative will be referred to throughout the following chapters, particularly in relation to the attributes of the plaintiff role and how the plaintiff's muteness impacts upon the proof of suffering. In the following chapters I will also demonstrate how the plaintiff's muteness contributes to the plaintiff's dependency on others and reinforces the power of those who have authority to speak on the plaintiff's behalf.

⁶⁴ *Risteska v The Commonwealth of Australia* [1999] ACTSC 56.

⁶⁵ See Chapter 6.

3.4 The Legal Injury Narrative as Moral Instruction

*'The Law – the archetype, the originary model – experienced in sacred times at the site of mythic reality, teaches us anew the proper patterns for belief, for feeling, and for social behaviour generally. Here lies the originary fount for cultural and characterological normalization. Here is a site where transgression of newly appreciated cultural and social norms may be appropriately assessed and resolved – with the aid of refreshed cultural forms: legendary or mythic themes, popular genres, familiar plots and character types through which the drama of trial is enacted. In this way the trial assures us of the intelligibility of reality. The heightened understanding it allows lifts us, at least for a while, above the constitutive ambiguity of everyday life. And in the transcendent euphoria it brings comes the moral beauty, and persuasive payoff, of a well-played narrative truth.'*⁶⁶

There are a number of different schools of thought about the purpose of tort law. Economic approaches generally refer to the promotion of some socially desirable end, such as wealth or welfare maximization.⁶⁷ Justice approaches focus on the parties to a particular dispute, and consider issues such as levels of precaution and reparation.⁶⁸ Typically, three main functions are said to form the basis of negligence actions for personal injury: prevention (others are deterred from engaging in negligent conduct), retribution (the wrongdoer is brought to account, there is a sense of justice) and compensation (the injured person receives damages equal to the injury sustained).⁶⁹ The legal injury narrative appears to incorporate these three functions. It prescribes appropriate standards of behaviour, condemns and punishes those who breach those standards, and rewards injured plaintiffs. However, while Pixérécourt and his contemporaries openly admitted melodrama's function as moral instruction for the masses, the breadth of the legal injury narrative's educative function has not been adequately discussed.

Although education of potential defendants aimed at the prevention of accidental injury is one of the commonly mentioned functions of negligence actions for personal injury, this is a fairly narrow view of its educative value. As I will

⁶⁶ R K Sherwin, *When Law Goes Pop: The Vanishing Line between Law and Popular Culture* (2000) 69.

⁶⁷ See discussion in D Dewees, D Duff and M Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (1996) 5-6.

⁶⁸ G C Keating, 'Distributive and Corrective Justice in the Tort Law of Accidents' (2000) 74 *Southern California Law Review* 193, 169.

⁶⁹ W F Foster, 'Some Comments in Favour of the Abolition of Fault Law' (1974) 8(1) *Akron Law Review* 57, 60.

demonstrate in the following chapters, the legal injury narrative does more than educate potential defendants about appropriate standards of care. Like Pixérécourt's melodramas, the legal injury narrative also provides more subtle direction about the desirability of restoring the status quo, and the appropriate behaviour and valued characteristics of others in the narrative, in particular those characters who are cast in the plaintiff role.

Melodramatic narratives display an extreme form of moralizing, emphasizing the presence and force of good and evil in the world, and demonstrating the need to confront evil and remove it from the social order.⁷⁰ They imagine an alternative world in which good always triumphs over evil. The legal injury narrative reflects this melodramatic moral resolution. It attributes a morally charged meaning to the defendant's action and provides the community with a coherent and comforting resolution. The trier responds to the breach of a social norm – rationalizing and creating order over chaos.⁷¹ In true melodramatic form, the recognition of the appropriate order is often given in 'a full-fledged trial, [with a] public hearing and judgment of right against wrong.'⁷² The public nature of the legal injury narrative gives it the status of parable, demonstrating how moral imbalances in society are, and should be, righted.

However, what is often more important in the sense of setting normative standards for behaviour, and which is highlighted when the legal injury narrative is viewed in its melodramatic form, is the implicit recognition of the characteristics of virtue in the plaintiff. Its melodramatic nature makes prevention, retribution and compensation merely ancillary to the recognition of the plaintiff's pre-existing virtuous state.

Public recognition is given by the judgment of where liability resides, but as Brooks points out, correct recognition by the judges does not always bring immediate resolution to the protagonist. The victim is still in an injured state and in need of catharsis.⁷³ The legal injury narrative appears to provide this desired

⁷⁰ Brooks, above n 1, 12. This could be tied in with the role of tort as preventative, to encourage safer behaviour by defendants.

⁷¹ P S Berman, 'Rats, Pigs and Statutes on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects' (1994) 69 *New York University Law Review* 288.

⁷² Brooks, above n 1, 31.

⁷³ Ibid 31. Aristotle's literary theory suggested that tragedy effected catharsis by a symbolic or ritual presentation of events that would be unendurable in daily life that transforms into

resolution by the fiction that an award of damages puts the plaintiff in the position as if the injury had not occurred.⁷⁴ The fact that it is the defendant making the payment of compensation⁷⁵ reinforces the notion of individualised morality, inherent in the melodramatic form.⁷⁶ This also reinforces the justice conception of tort – that negligence law is an articulation of our ordinary moral conceptions of agency and responsibility, carelessness and wrongdoing, harm and reparation.⁷⁷

In Pixérécourt's time, melodrama provided instruction for the masses. It suited the interests of the ruling class by subtly coercing the common people into respecting the status quo, which was based on the ruling classes' authority and power. The legal injury narrative is also a story aimed at the middle/working class. It is not of particular relevance to those with power, as they can generally choose to reduce risks to themselves (for example by purchasing safer cars, and avoiding physically riskier employment) to an extent that the less well-off cannot. If injured, they can afford to pay for private health care without the need to resort to the courts and depend on others for welfare. However, for today's common people, successfully telling one's story in accordance with the legal injury narrative can make the difference between a future of reliance on the public health system and the best care money can buy. In a sense, the legal injury narrative educates the common people about how they should behave (passively and respecting authority) in order to have their suffering alleviated by those in power.

something amounting to purification or rebirth. While Galligan suggests that torts may have some tragic value for society (T C Galligan, 'The Tragedy in Torts' (1996) 5 *Cornell Journal of Law and Public Policy* 139), this thesis argues that the melodramatic genre of the legal injury narrative certainly does not provide catharsis for the injured person.

⁷⁴ This ties in nicely with Aristotle's account of rectificatory justice – the action and the suffering are unequally divided (with profit for the offender and loss for the victim); and the judge tries to restore the (profit and) loss to a position of equality, by subtraction from (the offender's) profit: Aristotle, *Nicomachean Ethics*, T Irwin trans., 1985 at 126, quoted in H L Feldman, 'Prudence, Benevolence and Negligence: Virtue Ethics and Tort Law' (2000) 74 *Chicago-Kent Law Review* 1431, 1461.

⁷⁵ At least theoretically – note the implications of insurance, which are discussed in more detail in Chapter 8.

⁷⁶ This has been criticised by subscribers to the enterprise liability theory of tort law – urged adoption of compensation plans and strict liability rules by the courts in order to shift tort law in the direction of emphasizing social as against individual morality V E Nolan and E Ursin, 'The Deacademification of Tort Theory' (1999) 48 *Kansas Law Review* 59, 64.

⁷⁷ Keating, above n 68, 193. In a sense, the whole concept of negligence presupposes some uniform standard of behaviour, based on the fiction of the reasonable person: T C Galligan, 'The Tragedy in Torts' (1996) 5 *Cornell Journal of Law and Public Policy* 139.

3.5 Conclusion

When a melodramatic narrative is held out as universal and objective, the simplified and stereotyped representations of experience may not truly reflect the realities of the particular individuals who are subject to its moral imperatives. This is problematic when melodrama is more than simply entertainment, such as when it is enacted as part of a judicial system by which peoples' actions are regulated. There is a danger that the melodramatic narrative and moral undertones tend to become generative, producing reality effects that become 'facts'. In making these truth-claims, melodramatic narratives in the law have the potential to cut off the complexities of everyday experiences as being irrelevant and by reducing the ability of those involved to cope with their everyday lives. Accordingly the legal injury narrative has some concerning effects on both injured plaintiffs and society as a whole.

Injured plaintiffs are required to play the suffering victim role, and risk adopting the characteristics of that role as part of their continuing life narratives. Their dependency on others is emphasised and reinforced throughout the narrative, discouraging and even disallowing them from taking control of their own lives, and particularly their healing. The legal injury narrative also diverts attention from broader issues in society such as the causes of suffering and society's response to it. It discriminates against individuals based on stereotypes, and does so in such a way that it prevents any challenge to the dominant stereotypes. These issues are discussed in detail in the following chapters.

Chapter 4

Melodramatic Blame

Introduction

This chapter draws parallels between the attribution of blame in melodrama and the legal injury narrative. Consideration of the function of blame in the legal injury narrative is important because blame is a fundamental part of the narrative. Unless plaintiffs can identify a blameworthy defendant, they will be unable to tell their story in accordance with the legal injury narrative framework, and thus will not be entitled to have their suffering, however undeserved, recognised and alleviated. An examination of blame in the legal injury narrative is also important as it reveals the tension between the narrative's promotion of individual responsibility, while at the same time requiring plaintiffs to demonstrate a lack of responsibility and dependence in order to succeed in their claims.¹ This chapter argues that the legal injury narrative's melodramatic attribution of blame masks the inadequacy of tort law to address the causes of, and society's response to, suffering.

As we have seen in the previous chapters, melodrama and the legal injury narrative both attempt to explain 'undeserved suffering' in a complex world. This chapter shows that they do so by individualising blame to simplify a complex situation and provide the audience with the comfort of certainty. Melodramatic narratives also moralise blame which, in the legal injury narrative, creates some tension with the legal principle that negligence is not concerned with a defendant's intentions or character. Moralising blame also has the consequence of diverting the audience's attention from broader issues in relation to the causes of suffering and society's response to it.

4.1 Individualised Blame

Melodramatic narratives are based on individualised blame. There are similar reasons behind individualised blaming in both classical melodramatic theatre and the legal injury narrative. In both, individualised blaming can be explained as a

¹ See further Chapter 6.

response to industrialisation and modernity. Focus on individuals provided a secular fiction of control of humans over their own destiny, instead of being subject to God or fate, and of humans over machines.² Melodramatic narratives individualise blame by: simplifying events and focusing attention on the most active individual, identifying and characterising the active individual as the most likely subject for blame right from the start, and limiting possible causes of suffering by linking them proximately with the protagonist. The consequences of individualised blaming are equally as troubling in both contexts. Melodramatic narratives, whether in theatre or in the law, provide a moral sedative to the audience and divert attention from broader societal causes of suffering.

4.1.1 Why is Blaming Individualised?

Melodrama, in a sense, stems from the fear and confusion created by uncertain agencies. In its aim to inspire in its audience a sense of security or comfort about the controllability and predictability of the complex world, it looks to simplify blame when things go wrong. Singer points out that melodrama's typical reliance on 'outrageous coincidence, implausibility, convoluted plotting, deus ex machina resolutions, and episodic strings of action ... stuff too many events together to be able to be kept in line by a cause-and-effect chain of narrative progression'.³ However, melodramatic narratives achieve a fictional certainty by focusing on individuals and individual action, rather than the broader societal or contextual elements of the event in question.

This certainty was particularly important given melodrama's inception in the context of modernity. According to Brooks, melodrama was a product of the French Revolution and its aftermath: 'the final liquidation of the traditional Sacred and its representative institutions (Church and Monarch), the shattering of the myth of Christendom, the dissolution of an organic and hierarchically cohesive society'.⁴ In a post-sacred society it was no longer possible to blame God's will for personal suffering. Accordingly, the focus shifted on to other

² The need for an individual to blame was perhaps linked to the need to believe that accidents could be prevented by human vigilance. Particularly in an age in which the workings of many machines were beyond the comprehension of the general public, there was a natural need to simplify things by identifying the most likely (or most comprehensible) human cause for something going wrong.

³ B Singer, *Melodrama and Modernity: Early Sensational Cinema and Its Contexts* (2001) 46.

⁴ P Brooks, *The Melodramatic Imagination* (1976) 15.

individuals as the subject of blame. Singer's analysis of melodrama as a response to modernity gives some explanation as to why, in melodrama, causation is always focused on individual action (rather than, for example, fate). Singer suggests that melodrama was a response to (among other things) the new condition of individual vulnerability and competitive individualism within capitalist modernity.⁵ The common law mirrored this focus on individualised suffering and blame, developing a means for an injured person to seek redress from another person who could be said to be responsible.

In its early stages, the common law's notion of responsibility was based on established status relationships between the injurer and the injured. For example, where a person was injured on another's property, the extent of liability depended on the classification of entry. Liability was imposed on the owner of the property as a result of the relationship between the owner and the particular class of entrant, regardless of whether the owner caused the harm intentionally or unintentionally or whether they were 'blameworthy'.⁶

As agricultural communities developed into an expanding industrialised society, these kinds of status relationships became increasingly irrelevant and the early notions of strict liability for causing injury were no longer workable.⁷ Accidents frequently occurred between strangers, with no pre-existing relationship giving rise to a particular duty of care. Given the fact that there were no longer any strict social or religious hierarchies of protection there was a need for some new understanding of the relationships between members of society.

The common law developed certain standards of behaviour expected of individuals by the community with respect to the risk of injury. A duty to take care not to cause injury to others became applicable to everyone, regardless of their class or position in society. Through a more generalised conception of negligence, the law began to attribute blame to those individuals who caused harm when they failed to meet the established standards of behaviour.

⁵ Singer, above n 3, 46.

⁶ See Australian Law Reform Commission, *Report on Occupiers' Liability* (1988).

⁷ The New South Wales Law Reform Commission summarised the development of the law of negligence as a basis for compensation for personal injury in Chapter Two of its report into Accident Compensation. 'Accident Compensation: A Transport Accidents Scheme for New South Wales' (43, New South Wales Law Reform Commission, 1984).

However, with the development of the machine age and industrialisation, there was also a dramatic increase in the complexity of interactions and the possibility for accidents. It became much more difficult to identify a particular person as the causative agent of any particular harm. The legal injury narrative provided certain artificial limitations on the notion of causation so that it was easier to establish that a single person caused the accident.

4.1.2 Simplification of Events

Melodramatic plots are action-filled. Most of the action is engaged in by the villain, and the other characters respond more or less passively. In a plot where there is so much action by one character, blame is likely to be attributed to that character where the action causes or contributes to some kind of harm. For example, in *Coelina*, Truguelin is portrayed as wholly responsible for Coelina's suffering, due to his actions in forcing Coelina's mother to undergo a second sham marriage and then concealing this fact. Although Truguelin is clearly blameworthy to some extent for these actions, it is overly simplistic to say that Coelina's subsequent difficulties are solely caused by him. There are other characters in the play who have the opportunity to avoid or at least lessen Coelina's suffering, had they chosen to take certain actions. For example, it is arguable that Coelina's mother could have refused to go ahead with the second sham marriage in the first place. Or alternatively, she could have told Coelina the truth about her real father's identity before she died. Coelina's real father, Francisque, could also have disclosed what he knew at an earlier time. Coelina's guardian, Dufour, could have followed his heart and made further enquiries, rather than initially taking Truguelin at his word.

Causation in negligence cases is usually similarly complex. As Melton explains:

The defendant may indeed cause the plaintiff's injury, and if the story begins and ends with these two events, legal liability might well follow. The plaintiff's prior conduct, however, might have placed him in a position in which the defendant's actions would result in the injury, and if the plaintiff's actions were negligent, this fact might well reduce or eliminate the defendant's liability to him. To make matters more complex, a single cause may have several effects, some of them

necessary, some of them not, and any effect may have many possible causes.⁸

With any given event there will usually be more than one combination of factors incorporating human action, the conditions that made the event possible, and other conditions that may have hindered the event.⁹ Each of these combinations form a causal subset that may or may not lead to a person being blamed for the resulting harm. In any subset used to attribute blame to a person, the actor's behaviour is usually insufficient (in the sense that other conditions were required to end up with the result) but necessary (in the sense that without the action, the other conditions would not of themselves have achieved the result).¹⁰

However, the legal injury narrative reflects the melodramatic tendency to portray the defendant as the necessary and sufficient cause of the harm. In other words, it converts the complex chains of events leading up to the accident into a compact monocausal account focusing on individual action. The doctrine of *res ipsa loquitur* is a good example of the extension of the melodramatic simplification of the search for a human agent as the cause of harm, even in circumstances where it appears that the cause of the harm was an inanimate object. The doctrine provides that:

[W]here the thing [which is the immediate cause of an accident] is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.¹¹

In melodramatic narratives, this focus on the individual is encouraged by the narrative's introduction of a likely blameworthy individual in the very early stages of the narrative.

⁸ B F Melton, 'Clio at the Bar: A Guide to Historical Method of Legists and Jurists' (1998) 83 *Minnesota Law Review* 377, 441.

⁹ K G Shaver, *The Attribution of Blame: Causality, Responsibility and Blameworthiness*, Springer Series in Social Psychology (1985) 47.

¹⁰ Ibid 48.

¹¹ Erle CJ in *Scott v London & St Katherine Docks Co* (1865) 159 ER 665, adopted by the High Court in *Mummary v Irvings Pty Ltd* (1956) 96 CLR 99.

4.1.3 Identify Blameworthy Individual at the Start

In the first few scenes of melodramatic theatre the virtuous characters generally speak of the villain and his evil nature before he makes an appearance. The theatre audience are then warned to expect his imminent arrival on stage. When he does appear, stereotypically wearing a black cape and gloating about his evil plans, he is instantly recognisable as the villain of the story. The audience is then forewarned about the motives behind his future actions and are prepared to focus on them and condemn them.

Similarly, in the legal injury narrative, the focus is on the actions of the named defendant. This makes it somewhat easier to limit the complexities of causation – the decision maker and audience are usually only interested in whether or not identified acts or omissions by the defendant were causally relevant.¹² As O'Connell and Baldwin suggest: 'The structure of the trial (plaintiff versus defendant) and effective advocacy play to this bias for simplicity by reducing the number of options the jurors may have for assigning blame.'¹³ In fact, Atiyah points out that negligence based on fault only makes sense if attention is focused exclusively on the relationship between plaintiff and defendant, and no attention is paid to the possibility of some larger part of society bearing the loss.¹⁴ The use of the counterfactual 'but for' test (and its modern equivalent¹⁵) also contributes to the focus on the defendant as the subject of blame.¹⁶ It is generally much easier to imagine that, but for the clearly identified defendant's act or omission, the harm would not have occurred, rather than imagining a scenario based on different, and sometimes hidden, societal factors.

4.1.4 Proximate Link With Protagonist

Melodramatic narratives further limit the possible targets for an attribution of blame by focusing on those with a proximate link to the protagonist. In a sense, the legal injury narrative is the plaintiff's story: the plaintiff is the central role and the narrative starts and ends with the plaintiff. Many of the social issues that may contribute to an accident occurring may well be a product of circumstances

¹² J G Fleming, *The Law of Torts* (9th ed, 1998) 219.

¹³ J O'Connell and J R Baldwin, '(in)Juries, (in)Justice, and (Il)Legal Blame: Tort Law as Melodrama - or Is It Farce?' (2002) 50 *University of California Law Review* 425, 437.

¹⁴ P S Atiyah, *Accidents, Compensation and the Law* (3rd ed, 1980) 471.

¹⁵ Note that the Australia Civil Liability law reforms have varied this test: See Appendix 5.

¹⁶ N R Feigenson, *Legal Blame: How Jurors Think and Talk About Accidents* (2000) 27.

that arose well before the event in question. In an increasingly complex society it is much easier to blame an easily identifiable individual who engaged in conduct at a time, at a place, or that was causally proximate to the events giving rise to the harm.

For example, with a two car accident the easiest targets for blame are drivers of the two vehicles. The focus on these two individuals is emphasized by the fact that one of them, the person who seeks redress for suffering, is the protagonist in the story. From that protagonist's perspective, the only other human agent with whom they have had direct contact in relation to the immediate events in question, is the other driver. The plaintiff as protagonist is more likely to be able to tell a convincing story about the actions of a person with whom the plaintiff is familiar. For example, the plaintiff in the motor vehicle accident is unlikely to have had significant input or even thought about large scale social issues such as road planning and car design. However, the plaintiff has an immediate and physical connection with the driver of the other vehicle. This contributes to melodrama's tendency to provide a limited number of characters who are potential targets for blame.

In legal terms, this temporal priority between the defendant's act and the consequences is known as proximity. As there can be potentially unlimited chains of causation following any act or omission, defendants' liability is limited to the proximate effects of their negligence. Proximity is established by showing that the effects were a reasonably foreseeable consequence of the act or omission.¹⁷ This notion of foreseeability is another fiction that melodrama promotes as an imagined alternative. By limiting blame to the agents of actions with apparently foreseeable consequences, melodrama provides the comfort that those consequences could have been avoided. Melodrama conveniently diverts attention from more complex causes of harm, with respect to which the notion of foreseeability, and thus avoidability, is unworkable.

4.1.5 Consequences of Individualised Blame

Blame is a fundamental sentiment in melodrama. Heilman suggests that 'everyone wants to feel 'right', and one of the ways of doing this is to put the

¹⁷ *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd, The Wagon Mound* [1961] AC 388.

finger on those who are wrong'.¹⁸ In any melodramatic situation 'it is total defense or attack'.¹⁹ This enables us to reinforce our feeling of innocence because:

we are not implicated in any given evil,...or do not know we are, or forget we are, or because by attacking it we are scourged or purged. Blame is a moral sedative...²⁰

The melodramatic simplification of causation in the legal injury narrative provides a seductive pleasure of wholeness.²¹ However, accepting a single sufficient explanation for an accidental injury above another that may be a better, although much more complicated, explanation has some concerning consequences. In particular, this simplification encourages the social construction of accidents as matters of personal rather than corporate or systemic responsibility.²²

Melodrama's focus on the villain diverts attention from some larger societal issues underlying the plot. For example, Coelina's suffering may be said to have been caused by society's view of illegitimacy as a non-virtuous state. In other words, society treats those people who were born illegitimately as being not deserving of certain benefits due to virtuous members of society. Coelina's suffering may also be said to have been caused by society's requirement that women be dependent on their father/guardian and their husband for their well-being. These systemic problems are obscured by the simplification of the issue of blame as between the heroine and the villain.

In the legal injury narrative, any external political or social issues are similarly masked by the focus on individualised justice. The legal injury narrative is concerned about facts of individual injuries, not on the societal roots of such troubles.²³ As Scheppele points out:

¹⁸ R B Heilman, *Tragedy and Melodrama: Versions of Experience* (1968) 129.

¹⁹ Ibid 129, footnote.

²⁰ Ibid 129. In the legal injury narrative, our focus on the defendant and the consequent diversion from broader social responsibility for harms gives us this moral sedative – we don't have to be responsible for the person's suffering because it's the defendant's fault – not ours!

²¹ J L Smith, *Melodrama* (1973) 10.

²² N R Feigenson, 'Legal Meaning in the Age of Images: Accidents as Melodrama' (1999/2000) 43 *New York Law School Law Review* 741, 789.

²³ T Koenig and M Rustad, 'His and Her Tort Reform: Gender Injustice in Disguise' (1995) 70 *Washington Law Review* 1, 7.

If, for example, you see the particular car accident as the result of an individual driver's error ... you miss the role of broader forces that provide a context for these local causes. A public policy that encourages cars over mass transportation has a certain causal effect in creating a particular accident rate, and hence may be seen as responsible for the individual accident.²⁴

The relatively recent and dramatic increase in motor vehicle travel, has resulted in the risk of injury due to motor vehicle accidents becoming one of the major risks in everyday life. However, when a person is injured as a result of a motor vehicle accident, blame is typically attributed to one of the individuals driving a vehicle involved in the accident. There is generally no room to blame the changes in society which led to the prevalence of motor vehicles on the roads, or to examine how motor vehicle travel has developed in such a way as to exacerbate the risk of accidents. For example, many cars in Australia have the capacity to travel at speeds well over the maximum speed limit on Australian roads. Many accidents occur when drivers exceed those limits. However, when an accident occurs due to a driver speeding the driver is blamed as the individual responsible. There is no room to question the wisdom of manufacturing cars that are able to achieve such dangerous speeds.

Feigenson gives the example of a drink driving case, in which the defendant is portrayed as:

the sinner against society, the deviant 'problem drinker' as opposed to the 'normal' user of alcohol, the cause of half of all traffic deaths. From a complex reality, the drunk driver is constructed as the villain in a cultural melodrama, the sower of disorder in an otherwise orderly world. Thus, ... responsibility for these accidents is simplified, personalized, dichotomized, and moralized – individual responsibility (the 'unsafe driver') rather than corporate ('the unsafe car') or collective (the 'unsafe road' or 'unsafe transportation system') responsibility.²⁵

²⁴ K L Scheppele, 'The Ground-Zero Theory of Evidence' (1998) 49 *Hastings Law Journal* 321, 323.

²⁵ Feigenson, above n 22, 790 interpreting J R Gusfield, *The Culture of Public Problems: Drink-Driving and the Symbolic Order* (1981).

The focus on the defendant also avoids consideration of broader social issues that may underlie the plaintiff's suffering as a result of the injury. For example, an injury resulting in a physical disability is seen as a harm. However, much of the suffering associated with that harm is arguably because society does not adequately support those who are differently abled. Blaming an individual defendant for causing a plaintiff to become physically disabled and making them pay for the plaintiff's future special transportation costs (for example) diverts attention from broader social issues such as the lack of adequate transportation support for those with physical disabilities.

Even where the injury is found to have been caused by the defendant, in the assessment of damages another type of societal harm is often ignored. This relates to the method of calculating damages for projected future income or lost earning capacity by using gender based earnings tables. In other words, a woman's loss is calculated by reference to what other women are currently earning, which continues to be less than men in similar employment. This type of gender-based reference perpetuates assumptions that any current inequities in terms of male and female wages will continue, and that no woman will ever break out of stereotypical gender patterns.²⁶ The focus on the defendant's role in causing the physical injury leading to the plaintiff's inability to work diverts attention from a broader social harm – the fact that women are generally paid less than men for work in the public sphere.

These examples demonstrate O'Connell and Baldwin's point that:

Instead of uncovering the systematic origins of accidents, personal injury litigation not only distorts accidents as having a single cause but also paints them melodramatically by finding a histrionically reprehensible flaw on the part of some single individual. Thus, complex institutional factors are not just ignored, they are repressed.²⁷

This idea of a 'histrionically reprehensible flaw' on the part of an individual is a fundamental aspect of melodrama. In dream justice, the villain must deserve his comeuppance, just as the heroine must deserve to have her suffering alleviated. Although negligence law is theoretically not concerned with the intentions of the

²⁶ Finley, above n 48, 861.

²⁷ O'Connell and Baldwin, above n 13, 425.

defendant, the melodramatic nature of the legal injury narrative may give them some relevance in practice.

4.2 Moralised Blame

As well as being individualised, blame in melodramatic narratives also tends to be moralised. In other words, an individual is not just held responsible for the outcome in a simple causative sense. There is also an associated condemnation of that individual in a moral sense. The melodramatic notion of moral blame apparently contradicts negligence law's supposed lack of concern with a defendant's character or intentions. However, the legal injury narrative suppresses this inconsistency and uses moral blame to assist the judge in finding liability, or to justify a finding of liability where it might appear disproportionate to the defendant's conduct.

4.2.1 Types of Legal Blame for Personal Injury

Legal blame for personal injury may result from three different kinds of responsibility: relational responsibility, outcome responsibility, and moral responsibility. Relational responsibility occurs when a person is legally responsible even where that person cannot be said to have personally caused the harm (for example, in cases of vicarious liability).²⁸ Outcome responsibility is when those who cause harm are held responsible for it, even in the absence of fault (for example, strict liability).²⁹ A judgment of outcome responsibility may be made because of a social need to have someone bear the loss suffered.³⁰ It is possible to hold a person responsible for the outcome of his or her actions without any associated moral disapproval. For example, a person can be said to be responsible for causing a car accident when that person drove their car on to the wrong side of the road and collided with an oncoming vehicle. However, if this happened because the person suffered an unexpected heart attack while driving, there is unlikely to be an associated moral disapproval of the person as a result of what happened.

²⁸ Shaver, above n 9, 66.

²⁹ T Honoré, 'The Morality of Tort Law - Questions and Answers' in DG Owen (ed), *The Philosophical Foundations of Tort Law* (1995) 73, 81.

³⁰ Shaver, above n 9, 72; P Vines, 'Fault, Responsibility and Negligence in the High Court of Australia' (2000) *Tort Law Review* 130, 133.

Moral responsibility involves the sense that the person who caused the harm is morally culpable for doing so (for example, torts based on notions of fault).³¹ This type of responsibility involves an attitude of disapproval, not merely of the action or its consequences, but of the actor himself.³² Moral responsibility involves three steps of disapproval:

- Disapproval of the outcome – incorporating a recognition that the consequences of the event are negatively valued, and a particular notion of what constitutes harm.
- Disapproval of the behaviour – involving the recognition that what the person has done (or failed to do) is negatively valued.
- Disapproval of the actor – based on some normative standard that has not been reached.³³

In personal injury litigation, the outcome which is disapproved of is the undeserved harm to the plaintiff. However, as Schroeder points out, the underservedness of the plaintiff's loss is not enough in itself: there must also be comparable deficiencies on the part of the defendant.³⁴ In negligence, showing that a defendant caused the negative consequences (in the sense of simple outcome responsibility) is not of itself sufficient for the defendant to be held legally responsible. In addition, the defendant must be shown to be 'at fault'.³⁵ This is the basis of blame in tort law, known as the 'fault principle'.

4.2.2 The Fault Principle

The fault principle is the legal foundation for blame in the legal injury narrative. Atiyah describes the fault principle as follows:

- that it is just that a person who causes loss or damage whether to himself or another, should bear the burden of that loss or damage, to the extent that it was caused by his fault; and

³¹ T Honoré, 'Responsibility and Luck: The Moral Basis of Strict Liability' (1988) 104 *Law Quarterly Review* 530, 541.

³² J Glover, *Responsibility*, International Library of Philosophy and Scientific Method (1970) 64.

³³ In melodramatic terms, they are seen as not virtuous, in negligence terms they are not a reasonable person.

³⁴ C H Schroeder, 'Causation, Compensation, and Moral Responsibility' in DG Owen (ed), *Philosophical Foundations of Tort Law* (1995) 347, 350.

³⁵ McHugh J in *Perre v Apand Pty Ltd* (1999) 164 ALR 606.

- that it is just that a person who causes loss or damage to another without fault should not be required to compensate the other.³⁶

Accordingly, at least in theory, liability should be linked to the notion of fault. However, the fault principle has been widely criticised. The New South Wales Law Reform Commission summarised the main criticisms of the fault principle in negligence law in its report on transport accidents.³⁷ The first and foremost argument against the common law system of compensation for personal injuries based on fault is that the remedy is not available to all injured people.³⁸ As the Commission reported:

When fault is a criterion of both liability and reduction of damages...an entirely innocent plaintiff who cannot prove fault, and therefore gets nothing, is worse off than the grossly negligent plaintiff, who can prove fault but still recovers a proportion of the damages.³⁹

Thus, the fault-based system does not achieve (comprehensively or equitably) one of the main goals of a negligence action: providing compensation for injured people.

The Commission also pointed out that the evidentiary problems with proving fault often result in arbitrary results. The Commission also noted that judges themselves have frequently commented on the artificiality and arbitrariness of resolving the issue of fault.⁴⁰ This is particularly so in a very common form of negligence case: those resulting from high speed traffic accidents. These involve varying forms of transport and drivers of uneven experience and ability, occur suddenly and unexpectedly, and it is incredibly difficult to ascertain who was at fault in a legal sense.⁴¹

Finally, the Commission acknowledged that in today's complex society it is unrealistic to say that any accident is caused solely by human error. The Commission explained:

³⁶ P S Atiyah, *Accidents, Compensation and the Law* (3rd ed, 1980) 470.

³⁷ Accident Compensation: A Transport Accidents Scheme for New South Wales, above n 7.

³⁸ Ibid 3.17.

³⁹ Ibid 3.24.

⁴⁰ Ibid 3.31.

⁴¹ Ibid 3.29.

Other circumstances, such as lighting, road construction, or roadside structures obstructing vision may also be significant. The search for fault on the part of a driver may divert attention from the role that these matters have played and may play in future accidents.⁴²

This unrealistic focus on human error is exacerbated by the legal injury narrative's focus on individual blame.

The Commission also indicated that the standard of the reasonable person was often an impossible standard to meet. It noted that both the Australian Woodhouse Committee⁴³ and the Pearson Royal Commission in the United Kingdom⁴⁴ have pointed out that it is unrealistic to assume that a motorist can drive safely at all times and that lapses into carelessness can be avoided.⁴⁵ The problems with the reasonable person standard are discussed in detail in the following chapter.

Richard Abel, in his paper 'A Critique of Torts', argues that the fault system is theoretically unsound. Although he acknowledges that few would deny that endangering or injuring another merits condemnation and that victims' concerns deserve public recognition,⁴⁶ he argues that tort law is incoherent as a moral system for a number of reasons. One of his reasons is that the fault-based system consistently violates the basic principle of proportionality between the defendant's conduct and the magnitude of the penalty imposed.⁴⁷ Judges and juries can also overvalue or undervalue victims' misconduct, making crude comparisons between the fault of the parties.⁴⁸ As Abel explains, this kind of apportionment of fault between individuals may have been adequate when technology was simple, but today many torts are caused by both public and private collectives.⁴⁹ The fact that most cases are settled rather than adjudicated

⁴² Ibid 3.36.

⁴³ Woodhouse, *Compensation and Rehabilitation in Australia: Report of the National Committee of Inquiry* (1971).

⁴⁴ Pearson, *Royal Commission on Civil Liability for Compensation for Personal Injury* (1978).

⁴⁵ Ibid 3.34.

⁴⁶ R L Abel, 'A Critique of Torts' (1990) 37 *UCLA Law Review* 785, 791.

⁴⁷ Ibid 791.

⁴⁸ Ibid 792.

⁴⁹ Ibid 792.

also undermines the notion of fault in tort law, particularly given that most settlements explicitly deny any acknowledgement of fault.⁵⁰

The fault principle also appears not to address any of the main theoretical goals of tort law. Dewees et al found that the fault principle was not effective in achieving any of tort law's three normative aims (deterrence, compensation and corrective justice).⁵¹ They also noted the inherent contradiction between insurance and fault.⁵²

Not only is the fault principle theoretically unsound, it appears to have become irrelevant in practice. As the Ontario Law Reform Commission's report on Motor Vehicle Accident Compensation confirms:

We have abandoned the principle of personal responsibility based on fault in the area of personal injury reparation...We continue, however, to preserve the system premised on fault even though we have deprived it of much of its philosophical foundation'.⁵³

As this discussion has shown, there are wide ranging criticisms of the fault principle and how it is applied in personal injury actions. The legal injury narrative adds another layer of complexity to these criticisms, by diverting attention from them. Examining blame in the legal injury narrative also helps explain the resilience of the fault principle, even in the face of such strenuous criticism.

4.2.3 Blame and Moral Condemnation in the Legal Injury Narrative

Blame in the sense of moral condemnation of character is important in melodramatic narratives so that the villain is seen to deserve his comeuppance. However, in personal injury actions based on negligence, in which moral condemnation is supposedly not *legally* relevant, it appears to be something that judges implicitly consider and lawyers often explicitly refer to in the course of a trial. It seems that, in the legal injury narrative, it is important that the defendant be seen to deserve his comeuppance, just like the villain in melodramatic theatre,

⁵⁰ Ibid 793.

⁵¹ D Dewees, et al., *Exploring the Domain of Accident Law: Taking the Facts Seriously* (1996).

⁵² Ibid 41.

⁵³ Ontario Law Reform Commission, *Report on Motor Vehicle Accident Compensation* (1973) 17.

in order for justice to be seen to be done. The legal injury narrative is a narrative with apparently no moral ambiguity.

In tort law, negligence does not require proof of a malicious intent, so the legal injury narrative is not *overtly* concerned with developing the character of the defendant. However, once the defendant's actions and their negative consequences on the plaintiff are identified, it is easy to imply consistent motives. As evidenced by the following examples, there is occasional explicit moralizing about the defendant's character. Plaintiff lawyers often use moralized language to encourage a judge or jury to make a finding of liability, and judges also sometimes comment about a defendant's bad character. From this it can be inferred that implicit melodramatic moralising is frequent.

Many personal injury cases make reference to the defendant's blameworthy character on a broader scale than simply with respect to the particular actions in question. For example, in *Hansic v Cabramatta Community Centre Inc & Ors*⁵⁴ the judge described the defendant as 'a dogmatic and defensive person who was not prepared to concede any possibility of fault on his part'. In *Jambrovic v ACT Health Authority*⁵⁵, the judge accused the defendant employer of subordinating the safety of employees to 'penny-pinching budgetary measures'. In *Gray v State of Queensland*⁵⁶ a schoolboy sued for personal injuries he sustained during a football match. The plaintiff's case portrayed the opposing team as one with a reputation for violent play and breaching the rules of the game.

Where the defendant can be demonstrated to be characteristically blameworthy rather than, for example, someone who was unfortunate enough to suffer a lapse in concentration at a particularly bad time, a finding of liability is more satisfactory. For example, a responsible corporation (from the view of the shareholders) will aim to maximise profits. However, where the corporation can be portrayed as a 'greedy corporate profiteer' which exploits its employees, the goal of maximising profits can be seen as a negatively valued intention (particularly if we can hold up an innocent plaintiff who suffers as a

⁵⁴ [1999] NSWSC 1205.

⁵⁵ (1992) 108 FLR 8.

⁵⁶ [2000] QSC 465.

consequence).⁵⁷ Although a negative intention is insufficient for liability in negligence, if it can be established, then it is much easier to find the defendant liable.

Often, the defendant's 'villain' status is reinforced by evidence of habitual bad behaviour, even if this is not directly relevant to the case at hand. For example, in the *Faverty* case McDonald's was portrayed as a greedy corporate profiteer with a history of exploiting its teenage employees.⁵⁸ A similar kind of character can be identified in the judgment of the Victorian case of *Rosstown Holding Pty Ltd t/as Rosstown Hotel v Mallinson*.⁵⁹ The judge noted that the defendant corporation was 'well aware of the risks and chose to allow the hotel to be locked up at least expense to itself, thereby placing at risk those employees vouchsafed with the duty of locking up the hotel'.

The defendant is also often characterised as someone prepared to lie and deceive others in order to avoid the consequences of his action. For example, in *Acosta v Chegwin*⁶⁰ the trial judge described the defendant as 'endeavouring to reconstruct the accident, rather than give the evidence from his own memory... (even at the time of completing claim forms) to exculpate himself from his clear error of judgment and negligent driving'.

In modern employment-related injury cases the defendant is more often than not a corporation. Accordingly there is no detailed discussion of personality in the sense that may be possible with respect to an individual. However, Feigenson does point out that it is possible to paint a corporation as a 'villain' as happened in *Faverty's* case. Judges do not, however, hesitate to discuss the personality and character of the defendant's officers and employees, often comparing them in a bipolar manner with the plaintiff. For example, in *McCallion v U R Machinery Sales Pty Ltd*⁶¹ the judge noted that the defendant's witness 'gave his evidence ... without conviction at best and evasively at worst. By contrast, I formed the opinion that [the plaintiff] attempted throughout his evidence to tell the truth'.

⁵⁷ N R Feigenson, *Legal Blame: How Jurors Think and Talk About Accidents* (2000) 156.

⁵⁸ See discussion in Feigenson, above n 22.

⁵⁹ [2000] VSCA 166.

⁶⁰ (1998) NSW SC CA 40011/97.

⁶¹ [1999] VSC 543.

Similarly, in *Bagic v Commonwealth*⁶² the judge commented that 'there was something resentful in [the defendant's witness's] attitude when he gave evidence' and rejected his evidence where it conflicted with that of the plaintiff.

The fault principle appears to run counter to general notions of justice when the wrongdoer is brought to account to a much greater degree than his apparent level of blameworthiness, but the use of 'fault language' to portray the defendant as blameworthy in a broader sense, can result in a more satisfactory feeling that justice has been served. Rabin suggests that cases may even be decided based on fault language rather than fault principles.⁶³ He argues that a defendant who can be shown to be 'at much greater fault' than other people who may have contributed to the event in question is more likely to be found liable than a defendant who, comparatively speaking, was not so morally reprehensible. Rabin uses the example of *McDowall v Great Western Railway*⁶⁴ to illustrate his point. In that case, the railway had stored some railway cars on a slope. The railway cars were not placed beyond a catch-point, which would have prevented the cars from going down the incline if set loose. The railway's servants had, however, screwed down the car brakes and left them in a position in which they would not have caused any damage if not interfered with. Some boys, who reportedly often broke into cars, broke into one of the railroad cars and uncoupled it. The car then rolled down the slope and onto a highway, injuring the plaintiff.

Although the boys were not a party to the action, they were the subject of much discussion for two reasons:

- The plaintiff alleged that the defendant should have foreseen the risk of the boys uncoupling the cars and taken steps to protect her from that risk; and
- The defendants argued that the boys were the actual cause of the plaintiff's injuries.

⁶² [1999] ACTSC 134.

⁶³ R L Rabin, 'The Historical Development of the Fault Principle: A Reinterpretation' (1981) 15 *Georgia Law Review* 925, 958.

⁶⁴ [1903] 2 KB 331 (CA).

At trial, the railroad was held to be liable. However, on appeal the decision was overturned.⁶⁵ The appellate court focused on the conduct of the boys, their disregard for other peoples' safety, and the 'considerable operation' they had undertaken in order to uncouple the railway car. In these circumstances, the boys were held to be the real cause of the plaintiff's injuries. The boys were much more active in causing the risk and had associated bad intentions. The railway, on the other hand, was allegedly liable by omission (failing to take an additional step for safety) and its only actions were well-intentioned (the steps taken to secure cars). In these circumstances it was difficult to portray the railway as the villain. This difficulty was exacerbated by the fact that there appeared to be other, more clearly villainous, parties whose actions contributed to the accident occurring. The boys were portrayed using 'fault language', in contrast to the more moderate language used to describe the defendant. In a sense, the railroad's story was that the plaintiff had accused the wrong party of being the villain.

In order to reinforce the point that there were other parties who were more appropriate defendants, the railroad's lawyers portrayed the boys as characteristically blameworthy. The boys were portrayed as habitual criminals who frequently broke into cars. As the boys were not parties to the action, there was no opportunity for them (or their lawyers) to provide an alternative characterisation. However, it seems likely that, had they been involved in the litigation, their lawyer would have portrayed their behaviour along the lines of the 'boys will be boys' adage. In other words, their behaviour in uncoupling the railway car was simply a thoughtless and irresponsible act, typical of boys of their age. A finding that they were responsible for the very serious consequences of their actions could then arguably seem out of proportion to the degree of fault attributed to their behaviour (although the actual actions giving rise to the plaintiff's injury are no different in either description).

Other cases also show that where there is a choice between a clearly evil 'villain' and some lesser evil, both of which may be said to have contributed to the plaintiff's harm, liability is most likely to fall on the most villainous party. For example, Leslie Bender discusses a case in which a landlord was accused of

⁶⁵ [1903] 2 KB 331 (CA).

negligent key handling such that two men were able to use the key to gain access to a woman tenant's apartment and rape her.⁶⁶ The Tennessee Supreme Court majority said that such an event was not reasonably foreseeable. Bender, and the sole dissenting judge, Justice Martha Craig Daughtrey, both argued that to the average women, who lives in fear of rape in her daily life, rape was a very foreseeable consequence of key mishandling. In other words, the defendant in that case was characterised as having behaved as a reasonable 'man' rather than the apparently neutral reasonable 'person'. However, the finding that the defendant was not liable may also be explained by reference to the fact that there were another two clearly guilty 'villains' who caused the plaintiff's harm – the two rapists.

A similar trend can be found in cases in which a plaintiff seeks to recover from a prison authority, which has negligently allowed a prisoner to be released (either on parole or by escaping) and that prisoner has then caused harm to the plaintiff.⁶⁷ These cases are notoriously difficult to win against the prison authority. Again, this appears to be because there is another clearly guilty 'villain' – the prisoner concerned.

4.3 Conclusion

This chapter has argued that the legal injury narrative masks the underlying problems of the lack of certainty and illogicality inherent in the law of negligence as it is applied to personal injury cases. The legal injury narrative thus provides what Cover would call 'an imagined alternative'⁶⁸ to the less than perfect world of risk, accidental injury and suffering. However, this imagined alternative fails to adequately respond to the problems with which personal injury law is supposedly concerned: preventing injury, ensuring people take care for others' safety, and alleviating injured peoples' suffering.

Melodramatic blaming in the legal injury narrative is problematic because it conceals many of the underlying problems with liability in negligence law. In particular, its focus on individualised blame avoids consideration of broader

⁶⁶ *Doe v Linder Construction Co.*, 845 S.W.2d 173 (Tenn.1992).

⁶⁷ *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, *Swan v South Australia* (1994) 62 SASR 532.

⁶⁸ R M Cover, 'Nomos and Narrative' (1983) 97 *Harvard Law Review* 4.

causes of suffering in society. The legal injury narrative provides an appearance of dream justice, but in reality fails to respond to individual plaintiff's and other injured peoples' needs.

Chapter 5

The Defendant Role

Introduction

As we have seen in the previous chapter, the legal injury narrative requires the identification of a particular character to blame for the injured person's suffering. In the legal injury narrative that character is cast in the role of defendant. This chapter explores the attributes of the defendant role and the characters that may be cast in that role. Although this thesis focuses primarily on the role of the plaintiff and the impact of the legal injury narrative on the injured people cast in that role, it is also important to consider the role of defendant for two reasons. Firstly, the moral polarization of the plaintiff and defendant roles means that each role is defined by its difference to the other. Secondly, the peripety of melodrama may occasionally give rise to a role-reversal, whereby the plaintiff turns out to be the true 'villain' of the story as a result of demonstrating too many attributes typically expected of a character in the defendant role.

This chapter considers the attributes of the defendant role in the legal injury narrative, particularly the apparent focus of the narrative on the objective behaviour rather than subjective attributes of the character in that role, and the role's normative function. However, the chapter argues that subjective intentions are perhaps more important than appearances suggest, and that there is inconsistency in that negative subjective characteristics appear to be taken into account, whereas subjective mitigating characteristics are not. The chapter then goes on to explore the legal injury narrative's normative assumptions as they are applied to particular kinds of characters who may be cast in the defendant role.

The chapter then discusses some of the problems inherent in the defendant role and its application in the legal injury narrative. It illustrates how the legal injury narrative avoids confronting these problems by providing exceptions and rules leading to an appearance of justice, even when the character cast as the defendant appears to be unable to fit the requirements of the defendant role.

5.1 Attributes of Defendant Role

The defendant role is a stereotypically masculine one, and as such the defendant is usually portrayed as active and powerful. He also displays a lack of emotional concern for other characters, and is primarily motivated by self-interest. In addition to the defendant's masculine attributes, the defendant is also characterised as 'unreasonable'. In melodramatic theatre the villain is characterised by a lack of virtue and similarly, in the legal injury narrative, the characterisation of the defendant is based on a lack of reasonableness. Both of these attributes are based on an overriding notion of normality, and in melodramatic narratives, what is normal is assessed by reference to the status quo.

In melodrama, in which all characters are monopathic, there are clear delineations between those who are virtuous and those who are not. Melodrama holds out a universal standard theoretically achievable by all characters – that of virtue. Virtue is seen as a standard independent of levels of intelligence, education, and social standing. For example, in *Coelina* the virtuous characters' personalities range from Doctor Andrevon, 'the most sensible man in Savoy', to Michaud the miller, whose stupidity does not detract from his virtuous nature. Unfortunately, in personal injury litigation things are not always straightforward. However, in order to minimise the difficulties of complexity, tort law does not concern itself with a defendant's subjective characteristics, such as whether or not he is unlucky, particularly stupid or unfortunately clumsy. As Holmes explains:

If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbours, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbours than if they sprang from guilty neglect. His neighbours accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.¹

¹ Justice Holmes in "The Common Law" (1881) quoted in N Isaac, 'Fault and Liability: Two Views of Legal Development' (1918) 31 *Harvard Law Review* 954.

If we are to accept that all accidents can be avoided, we also necessarily must accept that all people have the capacity to behave in such a way as to avoid them. This is difficult when we consider that people have varying levels of intelligence and abilities, and that these are not attributes that are easy to assess. Accordingly, in order to avoid complicating the notion of choice and thus the ability to control one's actions, the legal injury narrative ignores the defendant's subjective characteristics and focuses on the defendant's actual behaviour. This behaviour is then measured against the objective standard of the reasonable man. This lack of internal depth of characters and the emphasis on the 'what' rather than the 'why' are classic features of melodrama.

In melodrama the villain's conduct is usually contrasted with that of another character, a virtuous man. In the legal injury narrative the defendant's conduct is similarly compared with the behaviour expected of a hypothetical reasonable person in the same circumstances. Accordingly, liability is determined by what the law would consider blameworthy in a reasonable person.² We ask whether the defendant acted as a reasonable person would have in the circumstances, not whether the defendant in question, in light of his individual characteristics, acted reasonably in the circumstances. In *Blyth v Birmingham Waterworks Co*³, Alderson B expressed it as follows:

Negligence is the omission to do something which the reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

The interesting part of this quote is the phrase 'those considerations which ordinarily regulate the conduct of human affairs'. The legal injury narrative presents these considerations as a given, and there is no scope to question whether or not they are appropriate, or whether or not they can (or should) be applied across the board to everyone who may become a defendant in a personal injury case. However, just as the qualities of virtue involve certain value judgments and normative assumptions, the standard of the reasonable person is not as inherently neutral and objective as it appears.

² Ibid 954.

³ (1856) 156 ER 1047 at 1049.

Moran considers the particular difficulties and inconsistencies in the way in which the standard is applied to men, women, children and those with intellectual impairments.⁴ She points out that difficulties arise when the 'default characteristics' of the reasonable person do not represent the person being judged.⁵ Although tort law now allows for defendants who are male or female (or even a corporation), the standard of care by which any particular defendant is judged has not changed a great deal from the original 'reasonable man', although the standard has been renamed the 'reasonable person'. Naffine has pointed out that the reasonable person is still generally construed as all things that a stereotypical male subject should be – rational, independent and autonomous.⁶ Honoré explains that this objective standard of competence, 'though purporting to be based wholly on fault, really imposes a form of strict liability on those who suffer from unavoidable shortcomings.'⁷

The legal injury narrative masks the law's tendency towards a policy of assimilation and disregard of difference. Everyone is judged according to the standard of the reasonable person, and everyone is thus assumed to be the same. Those with mental incapacities are required to meet the standard of the 'normal' person, whether or not this is actually possible.⁸ In a sense, this assimilation also affects the injured plaintiff, who is required to take whatever steps necessary to adapt to the requirements of a 'normal' society, rather than society making adjustments in order to make life easier for those with disabilities. The legal injury narrative promotes the fiction that the status quo consists only of 'normal' people and those who are only temporarily abnormal (due to infancy or some kind of undeserved suffering that will eventually be alleviated).

The risk of replicating inequalities is particularly high when the law is based on a melodramatic narrative aimed at restoring the status quo, such as the legal injury narrative. As Moran persuasively points out:

⁴ M Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (2003).

⁵ Ibid 2.

⁶ N Naffine and R J Owens (eds), *Sexing the Subject of Law* (1997) 35.

⁷ T Honoré, 'Responsibility and Luck: The Moral Basis of Strict Liability' (1988) 104 *Law Quarterly Review* 530, 530.

⁸ *Vaughan v Menlove* (1837) 132 ER 490 (CP).

To the extent that people commonly treat others in ways that are discriminatory or disrespectful, reading reasonableness as ordinariness will do nothing but replicate – with the force of law – existing inequalities.⁹

The following section considers different characters (other than the stereotypical male) who may be cast in the role of defendant, and how they are assessed according to the standard of the reasonable person.

5.2 Failing to Comply with the Defendant Role

There is some potential for a defendant to avoid liability if he can show that he does not fit the role. Where the defendant can be portrayed as a passive, or at least a less powerful, participant in the incident, he may avoid liability. Where it is very difficult to portray the defendant as a villain, for example when the defendant is engaged in some activity of great social importance, the defendant may also not be found liable. This section examines how the legal injury narrative deals with the situation when a passive or virtuous character is cast in the defendant role.

5.2.1 Passive Defendant

A child is a classic example of a defendant who can be portrayed as passive and thus avoid liability. Children have inherently feminine characteristics, one of which is passivity. Accordingly they will not usually be found liable for their actions. Children often avoid liability because they are seen to have been lured into behaving in a dangerous manner, so their actions are seen to be activated by external forces and beyond their own control.¹⁰

Adult defendants may also avoid liability when they are engaged in activities which are beyond their control. This passivity is a direct contradiction of the defendant's role in the narrative. A melodramatic villain is always the most powerful character, and always plays the active role in the narrative. Accordingly, where the defendant can be portrayed as lacking these two essential characteristics (power and activity), the defendant can no longer fit the characterisation as villain, and will not be found liable.

⁹ Moran, above n 4, 14.

¹⁰ Moran, above n 4, 8.

These situations often arise in war time or during some kind of emergency, when external pressures are seen to justifiably force adults to behave in a dangerous manner. For example, in *Daborn v Bath Tramways Motor Co Ltd*¹¹ a driver of a left-hand drive ambulance during war time, was negligent in turning into a lane on the right-hand side of the road without giving a warning signal. However, he was not held liable given that:

...during the war...it was necessary for many highly important operations to be carried out by means of motor vehicles with left-hand drives...it was essential that the ambulance service should be maintained.¹²

In effect, the driver of the ambulance is portrayed as a passive, or at least less powerful, participant in the incident. He in effect argues that he had no choice but to drive a left-hand drive vehicle in the circumstances, which fundamentally contributed to his negligent driving.

Similarly, in *Watt v Hertfordshire County Council*¹³, a fire officer employed by the defendant was injured on the way to an emergency in which a person was trapped under a bus. The officers needed to transport a heavy jack from the fire station to the scene of the accident in order to free the trapped person. The only vehicle equipped to carry the jack was out dealing with another matter, so the jack was loaded on to another vehicle on which it could not be properly secured. The plaintiff was injured when the jack moved during the journey and trapped the fire officer. The court held that in this case the saving of life justified taking considerable risk and the defendant was not found to be negligent. The fire officer in effect argues that he had no choice but to drive the vehicle on which the jack could not be properly secured.

Apart from the point about passivity, the defendants in both these cases may also be seen to be too virtuous to be found liable as the villain of the legal injury narrative. Both the ambulance driver and the fire officer were engaged in very important and socially valued activities at the time of the injuries. There may also be a more general point to be made from these two examples, linking back to the notion of individualised blame discussed in Chapter 4: that it takes war or

¹¹ [1946] 2 All ER 333 (CA).

¹² Asquith LJ at 336.

¹³ [1954] 2 All ER 368, [1954] 1 WLR 835.

emergency for accidental harm not to be automatically attributed to an individual villain.

5.2.2 The Virtuous Defendant

Melodrama concedes that occasionally a virtuous person may inadvertently put another virtuous person at risk. For example, Michaud unwittingly allows the villain Truguelin to take shelter in his mill, thus putting Francisque and Coelina at risk. Truguelin in fact succeeds in harming the virtuous Francisque by striking him with a heavy log. Melodrama avoids the inconsistency between the ideal of virtue not putting others at risk and the reality that this does in fact occur, by diverting attention from the not-quite-virtuous character towards the outright villain. The fact that the main risk to Coelina is created primarily by the villain Truguelin, assists in diverting blame from the other characters. Truguelin is portrayed as the sufficient cause of the risk and of virtue suffering, and the attention is drawn away from other contributing factors, such as Michaud's actions. Michaud's actions were justified on the basis that he was attempting to do a good deed by offering Francisque and Coelina shelter.

Similar situations can be found in the personal injury cases, especially those dealing with rescuers.¹⁴ A person engaged in a morally virtuous activity, such as a rescuer, is unlikely to be found liable (for negligence or under the doctrine of voluntary assumption of risk). For example, in *Haynes v Harwood* [1935] 1 KB 146 the plaintiff, a police constable, was injured when he attempted to stop some runaway horses. There were some women and children nearby and the plaintiff believed that they were in danger. The defendant argued that the plaintiff caused, or at least significantly contributed to, his own injuries. In a sense, the defendant was arguing that the plaintiff was the real 'villain' in the chain of events, by unnecessarily putting himself at risk. However, the plaintiff's counsel emphasized the fact that the plaintiff was simply succumbing to a 'moral and natural impulse' to ward off the potential danger, an impulse that was 'particularly true in the case of a police constable'.¹⁵ Greer L.J. pointed out that 'it would be a little surprising' for a rational system of law to deny a remedy to a

¹⁴ The Civil Liability Reforms also provide statutory protection for a rescuer from liability in negligence. See Appendix 5.

¹⁵ Reported at 149.

‘brave man’ in such circumstances.¹⁶ Maugham L.J. also concluded that ‘a rescuer, who acts on such a moral compulsion that having regard to his powers and his opportunities he would feel disgraced if he merely stood by, would be entitled to succeed in such an action as this’.¹⁷

Similarly, in *Eckert v Long Island Railway Co.* (1871) 43 NY 502, the voluntary assumption of risk defence was held to be inapplicable in a rescue case. A young child had strayed on to the defendant’s railroad track and Eckert was killed when he went on to the track to rescue the child. The railroad argued that Eckert’s own negligence by placing himself in a position of such danger had been the real cause of his death. However, the court found that Eckert had acted reasonably in order to save the child from imminent danger. Grover J held that:

The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons.

In both these examples the defendants were overtly active, leaving them open to liability in negligence. However, they were exonerated on the basis that their actions were objectively virtuous and they therefore did not fit the requirements of the defendant role.

5.3 Character and Role Fit

In melodrama the characters fit their respective roles easily. However, in the legal injury narrative characters cast in roles such as that of defendant are sometimes not a natural fit. In particular, characters with intellectual incapacities complicate the monopathic nature of the character in the defendant role.

Although failure to meet the standard is forgiven in certain circumstances – in the case of children and in the case of physical (and sometimes temporary mental) incapacities - permanent mental incapacities are not treated as excuses for a failure to reach the standard.¹⁸ Characters with other complicating attributes such as physical disability or childhood appear not to be so difficult to

¹⁶ At 152.

¹⁷ At 164.

¹⁸ Moran, above n 4, 20.

fit into the role. This seems to be because their special attributes are clearly visible and can be demonstrated by appearances and mute gesture. This section examines three categories of characters for whom fitting the defendant role does not appear to come naturally because of their stereotypically feminine natures: people with intellectual incapacities, children and women.

5.3.1 People with Intellectual Incapacities

People with intellectual incapacities appear to be a poor fit for the role of defendant. Their stereotypical characteristics are generally inconsistent with an active, powerful, masculine role and they cannot be blamed for their own intellectual shortcomings. However, negligence law judges those with intellectual incapacities according to the standard of the reasonable person. This is an anomaly which has caused great concern among tort theorists and commentators. For example, Moran notes that “given that even today those with developmental disabilities struggle to enjoy the full rights of citizenship, it is difficult to dismiss the worry that something troubling may be behind the fact that the law of negligence is selectively inattentive to their concerns”.¹⁹ The legal injury narrative is again useful in diverting attention from this further instance of inconsistency in negligence law.

*Vaughan v Menlove*²⁰ is a case commonly used as authority for the proposition that those with developmental disabilities can be held liable in negligence, even when their disability precludes them from foreseeing and avoiding the relevant harm.²¹ The decision in that case reveals an interesting insight into the use of melodramatic narrative in order to avoid such an apparent lack of logic. The plaintiff (Menlove’s neighbour) sought compensation for damage to his cottages caused by Menlove’s hayrick catching fire. The evidence revealed that Menlove had been repeatedly advised that the hayrick was a great fire risk, but had done nothing. Menlove argued in his defence that he should not be found negligent simply because he did not ‘possess the highest order of intelligence’. Menlove was found liable in negligence, regardless of his alleged intellectual shortcomings. However, Moran insightfully points out that the decision may

¹⁹ Moran, above n 4, 55.

²⁰ (1837) 132 ER 490 (CP).

²¹ Moran, above n 4, 26.

well be justified by the fact that it appeared clear that Menlove ‘simply did not value the interests of others enough to be bothered sparing them from harm’ and the risk was more ‘the result of the defendant’s moral obtuseness, not his cognitive or intellectual limitations’.²² In other words, the defendant could be quite easily portrayed as the melodramatic villain. Melodrama aims at an ideal and simplified world and cannot deal with complexity and complication (such as those people who do not fit the normative ‘ideal’, for example those who are intellectually or developmentally incapacitated). Melodrama’s response to these complications is to ignore and divert attention from them.

Children, however, are treated differently to adults with intellectual limitations. This appears to be primarily because they are seen to be a normal part of the ideal world. Their deficiencies are also only temporary, as they will, in the ideal world, grow up and mature into reasonable persons.

5.3.2 Children

Children are an important exception to the reasonable person standard. A child’s behaviour is not judged against that of the reasonable person, it is judged according to the reasonable child of the same age. This special treatment of children may be explained by reference to their traditional treatment in melodramatic narratives. Generally speaking children are seen to have typically feminine characteristics. Young boys develop their masculinity as they approach maturity.²³ With their feminine natures, children simply do not fit the masculine roles of villain and defendant.

Moran points out that ‘playing boys’ are often exonerated from liability for their dangerous behaviour because they have succumbed to things ‘calculated to attract or allure’ them or which are ‘flaunted’ in front of them.²⁴ This type of language emphasises two aspects of young boys’ feminine natures – innocence, in the sense that they do not know better than to act as they do, and passivity, in that they are simply yielding to an unbeatable temptation.

²² Ibid 27.

²³ See the discussion about melodramatic heroes in Chapter 2.

²⁴ Moran, above n 4, 8.

Children often avoid liability when their behaviour is portrayed as involuntary reactions to forces beyond their control.²⁵ That is, their passivity and innocence are emphasized. Moran refers to the case of *McHale v Watson*²⁶ and examines the portrayal of the defendant, Barry Watson, a twelve year old boy. She explains how he was characterised as an innocent and passive victim of the normal impulses of immature boys:

Barry Watson is not culpable because his imprudent act was the result of boyish impulse; imprudent boyish impulses, in turn, are forgivable if they are normal or ordinary; and such normal or ordinary impulses are non-culpable because they are natural – their true author is nature, not the boy.²⁷

Barry even ‘suffers’ the impulses of nature.²⁸ This portrayal of suffering is again a stark contrast to the role of defendant (and is, in fact, characteristic of the plaintiff role, in order to gain pity).

[A]s it gets played out in *McHale* and in other boy defendant cases, this complication of the reasonable and the normal ends up lending tremendous normative (and legal) significance to a certain understanding of masculinity. On this view, it seems, prudence is a virtue that has no bearing on – or is potentially even destructive of – at least some pre-eminently masculine activities. The sphere of liberty accorded such imprudence is thus correspondingly large.²⁹

Moran’s survey of the negligence cases involving child defendants revealed that they are almost all boys.³⁰ Melodrama may again provide an explanation – a female child, doubly feminine as a result of the combination of her sex and her youth, is doubly difficult to fit into the role of defendant.

However, when a child acts outside what is seen as ‘normal’ for a child of that age, he or she risks being found liable as a defendant. This reinforces Moran’s point that the court prefers ‘to read the reasonable person standard as demanding

²⁵ Ibid 69.

²⁶ (1964) 111 CLR 384.

²⁷ Ibid 74.

²⁸ Ibid 80.

²⁹ Ibid 83.

³⁰ Ibid 59.

propriety or ordinariness, rather than some more thoroughgoing moral conception'.³¹ This also reflects melodrama's insistence on reinstating the status quo, rather than making any detailed assessment of whether the existing state of affairs is moral or appropriate.

In cases in which children are found to fit the role of defendant, the children are usually portrayed as particularly wicked and as acting with the express intention to harm others. Moran discusses a number of Canadian cases in which children have behaved in a manner deemed to have gone beyond the normal recklessness of childish play. For example, the boy who had a 'propensity for throwing rocks' and who acted 'in a reckless manner with complete disregard for the safety of other people'³²; the boy who threw nitric acid at an 11-year-old girl in a 'senseless act of folly'³³. Again, just as in cases involving a defendant with an intellectual disability, portraying the child as a melodramatic villain diverts attention from the apparent inconsistency of holding a child liable for his or her actions.

5.3.3 Women

Early melodrama and early tort law were based on a similar premise – that women were incompetent and thus not ever really considered as potential villains and defendants. Women did not normally meet the necessary criteria to fit the defendant role. They usually had very little power, were generally passive and domestic creatures, and were largely dependent on men. However, even as society changed and women became more active and less dependent, they were rarely portrayed as villains in melodrama or sued as the sole defendant in a personal injury action. On the rare occasions when they were cast in those roles, they were portrayed either as abnormally, or at least temporarily, masculine.

Hyslop identified that in the fifty melodramas we have that Pixérécourt wrote between 1798 and 1835, only four female characters are villains.³⁴ These women have masculine characteristics, frequently wear male clothing, and move in male

³¹ Ibid 65.

³² *Michaud v Dupuis* (1977) 20 NBR (2d) 305 (SC), discussed in Ibid 86.

³³ *Pollock v Lipkowitz* (1970) 17 DLR (3d) 766 (man QB), discussed in Ibid.

³⁴ *Le Pèlerin blanc* (The White Pilgrim) 1801; *Olivier* 1829; *Le Jésuite* 1830; *L'Abbaye aux bois* (The Abbey in the Woods) 1832. G Hyslop, 'Deviant and Dangerous Behaviour: Women in Melodrama' (1985) 19 *Journal of Popular Culture* 65, 69-72.

domains (rather than the domestic, family role). However, almost all of these evil women are the victims of wicked or foolish men; they are accomplices and not real villains.

In a similar manner, early tort law focussed primarily on men as being the cause of accidents, with women only playing a secondary role. In tort law, women's incapacity as defendants initially resulted from the doctrine of coverture³⁵, but even after women were given a separate legal identity to their husbands, the perception that they were of lesser competence than men continued. Schlanger's study of cases involving injuries to women between 1860 and 1930 found that women were unlikely to be judged responsible for having caused an accident as it was assumed that, in the public sphere at least, their competence was lessened.³⁶ In other words, they were seen to be inherently incapable of achieving the standard of the reasonable man, and thus could never be held liable for failing to reach it. Welke also makes the interesting finding that up until 1920, women were never cast as pure defendants: their liability was only ever in question as a result of contributory negligence, following an accident in which they had been injured.³⁷

This is consistent with the legal injury narrative, in that the women in these cases were themselves injured, and thus potentially cast in the suffering heroine role. Welke found that the law of accidental injury, as it applied to female defendants, was premised on a narrow image of what constituted 'ladylike' conduct and on a debilitating image of women's nature.³⁸ In some cases women were found liable in negligence for actively exposing themselves to danger when any 'sensible woman' would have avoided it. The issue about whether or not they were liable for contributory negligence was, in that sense, a melodramatic question about whether or not they actively caused, and in effect deserved, their own suffering. It was not really a question about their ability to fit the defendant role, rather it was about their *inability* to fit the innocent plaintiff role.

³⁵ Under which a married woman had no individual legal identity during her marriage, it was subsumed by that of her husband.

³⁶ M Schlanger, 'Injured Women before Common Law Courts, 1860-1930' (1998) 21 *Harvard Women's Law Journal* 79, 86.

³⁷ Ibid 402.

³⁸ B Y Welke, 'Unreasonable Women: Gender and the Law of Accidental Injury, 1870-1920' (1994) 19 *Law and Social Inquiry* 369, 372.

Welke describes how the early application of the law of accidental injury embedded traditional gender relations in private law.³⁹ Although, in a sense women benefitted by not being found contributorily negligent by reference to their feminine nature, the cases reinforced the fact that women were in need of special care by men.⁴⁰ The law also encouraged women to remain submissive by excusing them from not taking care for their own safety when they relied upon men to do so.⁴¹ Welke also points out that some women were doubly disadvantaged by this policy. Her example of an 1885 opinion of the Georgia Supreme Court highlights the fact that although coloured women were burdened by the same disadvantages of clothing and opportunity as a white woman, they were required to suffer the burdens of their gender without the compensating hand of chivalrous masculinity, in that coloured women were not eligible for the assistance provided to white women (for example when boarding and alighting from trains).⁴²

Women's assumed incompetence could also work against them in that they could be held to a higher standard of care in order to compensate for their lack of skill.⁴³ In other words, where women left their appropriate domestic sphere and ventured out into a male world, they were expected to live up to a masculine standard of behaviour (or even exceed it). This standard was, after all, at the time referred to as that of the 'reasonable man'. This did not challenge the status quo, as it was still premised on the basis that women should not be in this sphere, and if they were, they were portrayed as masculine.

Leslie Bender describes the way in which tort law did the 'gentlemanly' thing by referring to the 'reasonable person' rather than the 'reasonable man', which avoided allegations of sexism, but in reality did not change the content and character of the standard.⁴⁴ Examining the standard from a feminist perspective reveals that in many cases, women are likely to be found to suffer from such shortcomings. Leslie Bender argues that women are particularly likely to fail to

³⁹ Ibid.

⁴⁰ Ibid 389.

⁴¹ Ibid 397.

⁴² Ibid 400.

⁴³ Schlanger, above n 36, 106; Ibid 373.

⁴⁴ L Bender, 'A Lawyer's Primer on Feminist Theory and Tort' (1988) 38 *Journal Legal Education* 3, 22.

meet the standard given that ‘reason’ and ‘reasonableness’ are typically masculine qualities, as opposed to emotion and intuition (or instinct), which are traditionally attributed to women.⁴⁵ This effectively contributes to maintaining the status quo. It reinforces the point that women who are (abnormally) active and powerful must ‘be a man’ and wear the consequences, rather than allowing an examination of the appropriateness of the standard and its gendered nature. This discussion also highlights the fact that emotion and intuition are not characteristics that are valued, whereas reason and control of one’s own body and mind are valued.

Characters are either assumed to fit the role by suppressing their subjective attributes, or by overshadowing them by emphasising their morally reprehensible character.

5.4 Consequences of Fitting Role

Where the defendant’s liability depends on objective behaviour rather than subjective factors, there is little scope for the defendant to argue that he or she should avoid liability on a personal basis. In melodrama, the villain’s monopathic evil characterisation implies that his behaviour is always underpinned by bad intentions. Accordingly, it is inconsistent with the villain’s role to even attempt to justify or excuse his actions. In fact, when the villain is confronted about his evil deeds, he usually recognises their blameworthy nature and his responsibility for the consequences. For example, in *Coelina*, once it appears that Truguelin’s trickery is about to be revealed, he admits his own blameworthiness:

Where shall I hide my shame? I have been wandering these mountains since morning but I have found no hiding place, no cavern deep enough to swallow my crimes. I betray my own guilt...No rest for the wicked.

The completeness of his evil nature means that he never attempts to justify or excuse his actions. He makes no plea that, for example, he had Coelina’s mother’s best interests at heart, by ensuring that she and her children were supported by a Baron with substantial financial means, rather than a ‘miserable creature with neither rank nor breeding’ (as Truguelin describes her real father).

⁴⁵ Ibid 25.

These kinds of excuses would complicate his otherwise monopathic wickedness. In fact, typically in melodrama the villain has very little opportunity to make any response to the finding of his responsibility for the heroine's suffering. In *Coelina*, Truguelin is led off by the police before the actual denouement takes place.

In the legal injury narrative there is similarly little room for any justification or excuse of the defendant's actions. Where the defendant is not judged according to his or her subjective characteristics, many exculpatory factors are automatically deemed legally irrelevant. Birks suggests that the reasonable person standard 'sets an objective standard of competence to define bad practice, but does not ask whether the particular defendant was in fact worthy of reproach for the particular incident in which he fell below that standard.'⁴⁶ Where the audience is not shown any character depth, they have little choice but to base their assessments on assumptions about the character's personality, abilities and morality. In the context of melodrama, it is unnecessary to ask the question 'why did the villain act in this way?' as, once it is established that the villain has put the heroine's virtue in peril (an inherently blameworthy act), the 'why' is answered by the simple fact that the villain is a bad character. The villain's actions in causing virtue to suffer are not always clearly motivated, but often stem from his greed, jealousy or general frustration in his inability to obtain something he desires.

The villain's motivation is not always proportionate to actions it initiates. A similar disproportionality is found in the legal injury narrative, in which a defendant's liability as a result of not meeting the objective standard is not necessarily proportional to the degree of blameworthiness of the individual defendant for the consequences. The defendant's liability is assessed according to the plaintiff's loss. Abel suggests that those held liable experience tort damages as punishment.⁴⁷ Where this punishment appears to be greatly out of proportion to the defendant's sense of wrongdoing, the defendant is likely to be antagonised. The defendant ends up cast as the sole villain which exacerbates the antagonism between the parties, reinforcing the already problematic effects

⁴⁶ Birks, "The Concept of a Civil Wrong" in DG Owen (ed), *Philosophical Foundations of Tort Law* (1995) 45.

⁴⁷ R L Abel, 'A Critique of Torts' (1990) 37 *UCLA Law Review* 785.

of the adversarial system. Accordingly, where a defendant can be portrayed as fitting the role, this is likely to increase the adversarial nature of the proceedings, reducing the likelihood of cooperation and settlement, exacerbating antagonistic behaviour, and limiting the participant's thinking.⁴⁸

5.5 Conclusion

Melodrama's insistence that a morally reprehensible individual must be blamed for any threat to virtue is echoed by the legal injury narrative's portrayal of the defendant. In order to avoid the complexities of human nature, the narrative emphasises the defendant's actions rather than intentions. It compares the defendant's actions with those of a hypothetical reasonable person. The reasonable person's characteristics are those seen as 'normal' by the existing society, and there is no room to question whether or not those characteristics are actually representative of the defendant. The application of this standard perpetuates existing discrimination and inequalities, particularly with respect to people with intellectual incapacities and women.

The legal injury narrative's requirement that the defendant be active and non-virtuous also leads to exceptions in the law to excuse from liability defendants who do not meet these criteria. These exceptions more or less prove the rule that the defendant must be portrayed as a 'villain' in order to properly fulfil the role.

⁴⁸ Carrie Menkel-Meadow criticises the way in which adversarialism perpetuates bi-polar thinking and teaches people to act towards each other...prevent[ing] not just better and nicer behaviour, but more accurate and open thinking". C Menkel-Meadow, 'The Trouble with the Adversarial System' (1996) 1 *Journal Institute Study Legal Ethics* 49.

Chapter 6

The Plaintiff Role

One of the curious consequences of the way in which damages are assessed for personal injuries and disabilities is that virtues such as courage, stoicism and successful control of emotional reactions can result in the diminution of damages whilst the results of a lack of these virtues can increase damages.¹

Introduction

Having identified in the previous chapters the relevance of melodramatic blame and the characteristics of a blameworthy defendant, this chapter now turns to the requirements of the plaintiff role in the legal injury narrative. For although plaintiffs must identify a blameworthy defendant with particular characteristics, they must also demonstrate their own fulfilment of the requirements of the plaintiff role.

In this chapter I examine how the need to comply with the requirements of the plaintiff role may impact negatively on the health outcomes of injured people cast in that role. In order to do so, I first consider the requirements of the role, particularly its feminine characteristics of passivity, dependence and muteness. In the following sections I discuss the consequences of the injured person either failing to comply with the requirements of the plaintiff role, or overdoing their attempts to comply. In the penultimate section I consider how different characters may or may not fit the role. Finally I suggest some consequences for an injured person who successfully fits the role.

6.1 Attributes of Plaintiff Role

In the legal injury narrative, the role of the plaintiff is analogous to the role of the heroine in melodrama. Although the plaintiff role may be filled by either a male or female character, the role itself has typically feminine characteristics. Just as the heroine role in melodrama represents the feminine as compared with the masculine villain, the plaintiff is the feminine role opposed to the masculine defendant.

¹ Hope JA in *Ralevski v Dimovski & Anor* (1986) 7 NSWLR 487 at 796.

The plaintiff role's defining attributes are passivity, dependence, muteness, innocence and virtue. The attribute of virtue is discussed in detail in Chapter 7. The following sections of this chapter consider the interconnected attributes of passivity, dependence, innocence and muteness.

In the legal injury narrative the plaintiff's passivity is demonstrated in three respects. Firstly, the plaintiff must have been passive in terms of the causation of the injury. The plaintiff is represented as 'virtue-as-innocence', placed in peril by the evil reign of the defendant.² The defendant controls the structure of events and the plaintiff, silenced and passive, is unable to call into question the defendant's conduct.³ The second and third respects relate to the melodramatic 'theme of failure'⁴, in that the plaintiff cannot resolve the situation in which he or she is enmeshed. The plaintiff must be passive in the sense of not being responsible for his or her continued suffering, and also passive in terms of the resolution of the narrative. He or she must unquestioningly accept the choices made by authority figures as to the recognition of, and compensation for his or her suffering.

6.1.1 Passivity in Relation to Causation of the Injury

The plaintiff's passivity is a direct contrast to the active nature of the defendant's role. The defendant is portrayed as the active character, whose actions caused the plaintiff's injury. The plaintiff is portrayed as the passive injured object.

However, passivity is generally speaking not a valued characteristic. It is only acceptable if it can be somehow justified. In melodrama, the heroine's passivity is justified as a result of the female character's natural state. In other words, passivity is a valued feminine characteristic, and accordingly the heroine's feminine nature requires her to behave in a passive manner with respect to other characters. Her passivity also obtains its moral power by emphasising her family relationships. For example, in *Coelina*, the heroine is portrayed as a young woman who is devoted to her guardian and respectfully obedient to him, even when he apparently harshly banishes her from the house. This is a socially acceptable demonstration of passivity.

² P Brooks, *The Melodramatic Imagination* (1976) 30.

³ Ibid.

⁴ J Halliday, "Sirk on Sirk" (1971) 119, quoted in L Jacobs, 'The Women's Picture and the Poetics of Melodrama' (1993) 31 *Camera Obscura* 121, 139.

In negligence law, the element of duty of care is, in effect, about establishing the circumstances in which the plaintiff's passivity is acceptable. This is because the duty of care requirement can be said to be based on the concept of the powerful having a responsibility to take care to protect those weaker than themselves. Prue Vines explains:

The elements of the duty of care which emphasise moral choice take their meaning from ideas such that certain people (like statutory authorities) have more power or control and therefore greater ability to make choices than weaker individuals and therefore are obliged to take more care of them.⁵

In other words, where a duty of care is established, the defendant is required to take active care not to harm the plaintiff. Accordingly, the plaintiff may reasonably expect that this care will be taken by the defendant, and accordingly will not be responsible (at least to the same extent) for taking active steps to protect him- or her-self.

The moral acceptability of passivity may arise from the expectations attached to the particular character playing the plaintiff role, or from the particular circumstances of the interaction between the plaintiff and the defendant. For example, where the plaintiff role is filled by an infant character, the infant's passivity is naturally acceptable. Infants are generally dependent on adults to take care of their safety and protect them from harm, and adults will usually have a duty to take care of children within their control.⁶ Accordingly, passivity is morally acceptable in infant plaintiffs, who are not expected to be particularly active in avoiding injury.

In melodrama, the heroine's passivity is justified due to her familial position. In the legal injury narrative the plaintiff's passivity may also be justified by portraying her in a metaphorical familial position. For example, Feigenson

⁵ P Vines, 'Fault, Responsibility and Negligence in the High Court of Australia' (2000) 8 *Tort Law Review* 130, 137.

⁶ But note case law which holds that parents will be held liable for acts but not omissions which cause harm to their children on policy grounds: *Richards v State of Victoria* [1969] VR 136, *Geyer v Downs* (1977) 138 CLR 91, *Robertson v Swincer* (1989) 52 SASR 356.

points out that in the *Faverty* case, Theurer was cast as a passive victim of McDonald's lack of 'parental' care.⁷

Where the character is not a naturally passive one, such as an adult male, his passivity can be justified as a result of his position in a socially acceptable power relationship with the defendant. The classic example is the relationship between employer and employee, in which the employer typically has greater resources, greater knowledge and greater control over the people and the situation involved. In the employment relationship, the employee's situation of passivity is emphasised by the employer's ability to enforce obedience, as demonstrated in the case of *McLean v Tedman*:

The employer's obligation is not merely to provide a safe system of work; it is an obligation to establish, maintain and enforce such a system. Accident prevention is unquestionably one of the modern responsibilities of an employer...And in deciding whether an employer has discharged his common law obligation to his employees the Court must take account of the power of the employer to prescribe, warn, command and enforce obedience to his commands.⁸

In cases in which the plaintiff has been injured at work, the subservience of the employee to the power of the employer, and the lack of any right in the employee to criticise the employer's conduct is often emphasised. The plaintiff is portrayed as lacking any power to control his or her own destiny, for example by having no choice as to whether or not to carry out a dangerous task. Given this notion of power in the employer, it is not surprising to find that the plaintiff employee is frequently portrayed as having been 'required' by the defendant employer to do something causing injury.

For example, in *Kingston v State Fire Commission*⁹ the plaintiff's counsel argued that the plaintiff was 'required to embark on this descent from the top of a parapet wall', 'required to embark upon his descent unassisted', 'the risks involved in requiring him to set off without such assistance could easily have been avoided', 'he was required to descend from a great height, the second factor

⁷ See discussion in N R Feigenson, 'Legal Meaning in the Age of Images: Accidents as Melodrama' (1999/2000) 43 *New York Law School Law Review* 741.

⁸ *McLean v Tedman* (1984) 155 CLR 306 at 313.

⁹ Unreported judgment, Hobart 18.3.99.

was that he was required to descend with a heavy laden stretcher and the third factor was that he was required to do this with a low anchor point.' In *Frost v Woolworths Ltd*¹⁰ the plaintiff was employed as a 'pallet picker' at the defendant's bulk store. The plaintiff had to make up orders for local supermarkets by loading cartons of stock on to pallets. It was alleged that the defendant required the plaintiff to work quickly without proper or adequate regard for his safety. The plaintiff was required to lean well forward across the pallet and to lift the carton of sugar at the rear of the pallet, which manoeuvre was instrumental in causing his injury. This case also demonstrates the characteristic of a lack of knowledge. The plaintiff is also frequently portrayed as not having sufficient knowledge to protect him or herself. For example, in *Frost v Woolworths Pty Ltd* the plaintiff was injured when he tried to move a carton that appeared to be stuck for some unknown reason. Miles CJ described the plaintiff as acting in a 'state of ignorance'.¹¹

In *Bagic v Commonwealth*, the plaintiff was injured when lifting a heavy beam at work. He gave evidence that he recognised the dangers inherent in trying to lift the beam by himself, and in fact asked his employer for assistance, which was refused. Although the plaintiff was described as 'an experienced tradesman [who] knew about lifting', Miles CJ found that:

The plaintiff was working, presumably under pressure, and did not fail to ask for assistance. When it was refused, the decision to try and lift the beam on his own did not constitute a failure to exercise reasonable care for his own safety. His decision does not need to be excused as momentarily inadvertent. In practical terms it was either lift the beam or refuse to work. He chose to lift the beam.¹²

Even where the plaintiff and defendant are not in an employment relationship, the court will often find that the plaintiff was required to do something leading to injury. In *Future Look Landscaping Pty Ltd v Hanlon*¹³ the plaintiff was injured when the defendant's driver asked the plaintiff to give him a hand to lift a concrete mixer off his truck. Although the plaintiff agreed to help out simply out

¹⁰ [2000] ACTSC 106.

¹¹ [2000] ACTSC 106.

¹² [1999] ACTSC 134.

¹³ BC9805239, CA 40658/97.

of his good nature, the court held that the plaintiff 'was more in the position of an employee required by his employer to perform a task with a risk of injury' and that the defendant's driver 'really left him no choice'. Giles JA (with whom the other judges agreed) stated that:

under the circumstances, the respondent had no choice but to help to lift ...[he] had lifting thrust upon him.¹⁴

These examples all demonstrate how the plaintiff's passivity, as a result of powerlessness in relation to the defendant, is an important part of the legal injury narrative.

6.1.2 Passivity in Response to Suffering

The plaintiff role also requires a passive response to suffering in order that the plaintiff be seen as pitiable. This is important in order that the judge develop the appropriate feeling of empathy, including the motivation to take action to ease the plaintiff's suffering. The plaintiff's inability to ease his or her own suffering is required before the judge can make a decision to assist him or her.

Tied into the passive response to suffering is the requirement that the plaintiff be dependent upon, and passively comply with, authority figures such as medical practitioners. For example, an injured plaintiff is expected to seek usual medical advice and treatment.¹⁵ If a plaintiff fails to accept the treatment recommended by a medical practitioner, the defendant may argue that this was a failure to mitigate the plaintiff's loss.¹⁶ In other words, the plaintiff became actively responsible for the continuation of his or her suffering.

Injured plaintiffs are required to accept reasonable medical treatment in order to fulfil their duty to mitigate their loss. However, refusing medical advice can be excused, provided that the reason for refusing arises from the plaintiff being

¹⁴ BC9805239, CA 40658/97.

¹⁵ *Watts v Rake* (1960) 108 CLR 158, 34 ALJR 186, Dixon CJ at 159; *Munce v Vinidex Tubemakers Pty Ltd* [1974] 2 NSWLR 235 (CA); *Plenty v Argus* [1975] WAR 155 (FC); *O'Donnell v Reichard* [1975] VR 916 (FC).

¹⁶ The court will ask whether or not a reasonable person would have refused treatment in the circumstances as they existed for the plaintiff, and subject to factors such as any difficulties of understanding and the particular medical history and condition that affected the plaintiff: *Glavonjic v Foster* [1979] VR 536; *Karabotsos v Plastex Industries Pty Ltd* [1981] VR 675 (FC); *Donjerkovic v Adelaide Steamship Industries Pty Ltd* (1980) 24 SASR 347; *Lorca v Holts' Corrosion Control Pty Ltd* [1981] Qd R 261 (FC); *Dininis v Kaehne* (1982) 29 SASR 118; *Fontaine v Quality Platers* (1994) 12 WAR 71 (FC).

demonstrably passive in another way. This may be due to a recognised psychological condition, or because the plaintiff's personality gives rise to typically feminine or childlike behaviour. For example, in *Fontaine v Quality Platers* (1995) 12 WAR 71, the male appellant's failure to accede to medical recommendations was held not to be unreasonable given his very low threshold of pain, his anxiety state and his 'childlike dependency' on his wife.

In *Walker-Flynn v Princeton Motors Pty Ltd* (1960) 60 S.R. (N.S.W.) 488 a young married woman suffered injuries that rendered her incapable of having a child normally with the result that each pregnancy carried an increased risk to her life. It was conceded that she could avoid this risk by complying with medical advice to take contraceptive measures. However, the court did not discount her damages when she refused to do so on religious grounds. In a sense in this case, the plaintiff demonstrated a morally acceptable passivity or submission to a greater authority than the medical practitioners: her God.

In *Karabotsos v Plastex Industries Pty Ltd* [1981] V.R. 675 the plaintiff was held not to have unreasonably refused to undergo surgical treatment for the alleviation of his disability. This was largely due to his being a Greek immigrant, based on evidence that 'surgery in the minds of the Greek population has an unhappy expectation'¹⁷, and that the plaintiff had a poor command of the English language and was uneducated.

The legal injury narrative thus promotes passivity as the appropriate response to suffering. However, as I explain later in this chapter, there is a fine line between enough passivity and too much passivity in relation to suffering.

6.1.3 Passivity in Relation to Resolution

In melodrama, the heroine never attempts to alleviate her suffering by actively attempting to prove her virtue. She simply resists by continuing to demonstrate her virtuous nature and waiting for other, more authoritative, and inevitably male, characters to recognise it. Coelina, for example, does not take steps to investigate the true circumstances of her birth. Surprisingly, she does not even ask Francisque to explain things to her during their journey away from Dufour's

¹⁷ The trial judge quoted by Young CJ at 679.

home. In fact, Francisque only reveals his marriage to her mother when asked by Dufour some time later.

In the legal injury narrative the plaintiff role requires a similar passivity. In order to be successful in the action for compensatory damages, a plaintiff generally requires assistance from a solicitor and/or a barrister. Self-represented litigants are at a significant disadvantage. The Australian Institute of Judicial Administration, in its report on Litigants in Person, pointed out that:

The problem of self-representation is not just a lack of legal skill - it is also a problem of a lack of objectivity and emotional distance from their case. Litigants in person are not in a good position to assess the merits of their claim...¹⁸

The report also confirmed that representation is relevant to outcome, and that where a litigant appears in person they will ordinarily be at a disadvantage because of their lack of legal skill.¹⁹ Accordingly, the plaintiff is expected to accept his or her lawyer's advice. The client's lack of familiarity with universal legal narratives means that he or she must 'submit the matter (and one's own self)' to the lawyer.²⁰

In the courtroom, the plaintiff is required to behave appropriately. In practice this means complying with directions about when to sit, stand, speak and even what the plaintiff is allowed to say and when. Once the judge has decided the case, the plaintiff is also expected to comply with the judgment.

The plaintiff is forced to seek 'paternal protection from a court which ... de-emphasizes ...[the plaintiff's] own resilience and capacities.'²¹ For the personal injury plaintiff, the trial procedure is difficult to understand, alienating, uncomfortable and allows the client only limited participation.²² This has an additional negative effect on the client as perceptions of control and dignity are

¹⁸ Australian Institute of Judicial Administration Incorporated, *Litigants in Person Management Plans: Issues for Courts and Tribunals* (2001) 4.

¹⁹ *Ibid*, 5-6.

²⁰ G R Williams, 'Negotiation as a Healing Process' (1996) 1996 *Journal of Dispute Resolution* 1, 18.

²¹ K Bumiller, *The Civil Rights Society: The Social Construction of Victims* (1988).

²² E A Lind and et al, 'In the Eyes of the Beholder: Tort Litigant's Evaluations of Their Experiences in the Civil Justice System' (1990) 24 *Law and Society Review* 953, 959.

important to litigants.²³ This perception of lawyers as taking away the injured person's control is reflected in comments made by one interview subject. He explained that he went to see two lawyers about his workers' compensation claim (one a union lawyer and one a private lawyer) but decided in the end to negotiate with the insurer himself. He said that his sister was involved in litigation as a result of a fall and she felt like she had no control any more and had become negative and depressed. This convinced him that he would be better off dealing with the problem himself. However, his decision may well have been different if he had become involved in litigation, rather than direct negotiation with the insurer.

6.1.4 Mute Role

In the legal injury narrative, the plaintiff plays the mute role, both in the circumstances leading up to the injury and in the trial. An example in which the plaintiff was mute, in the sense that nothing was said to prevent the accident occurring, can be found in *Simcoe v State Rail Authority of New South Wales*.²⁴ In that case the plaintiff was required to move some very heavy drums. He did not ask for assistance to move them from the defendant's manager or foreman. The foreman left before the plaintiff had a chance to ask for assistance, and although he theoretically could have sought out the manager, the judge acknowledged that he might have been unwilling to approach someone in that position to point out a perceived danger and ask for assistance. An example in which the plaintiff was rendered effectively mute gave rise to the case of *Conyard v Hancock Bros Pty Ltd*.²⁵ In that case, the plaintiff and his fellow workers regularly requested mechanical assistance with respect to certain manual tasks they were required to perform in the course of their employment. The defendant employer ignored their requests, although the assistance was eventually provided after the plaintiff's injury. A tension in the text of muteness in the legal injury narrative arises in this context: if a plaintiff is too verbal in complaining about unsafe conditions, he is at risk of a finding of contributory negligence in failing to take care for his own safety as he has demonstrated knowledge of the risk.

²³ Ibid 973.

²⁴ [1999] NSWSC 1275.

²⁵ BC9801028, Supreme Court of Queensland, 1713 of 1995.

The classic context of muteness in both melodrama and the legal injury narrative is the trial itself. It is when the heroine/plaintiff is required to demonstrate his or her virtue and suffering that his or her muteness is most profound. In *Le chien de Montargis* it is during Eloi's trial that his muteness creates the most difficulty. He is unable to explain to the magistrate his innocence or demonstrate his true virtuous nature. This same kind of muteness occurs to a plaintiff in a personal injury trial.

In a personal injury trial, the injured plaintiff is mute due to a cultural barrier. A personal injury client speaks a different language to the lawyers and judges, who are familiar with the 'language of law'. This language is more than a knowledge of legal terminology. It involves an understanding of how legal narratives are constructed. As Clark Cunningham describes it, the client's 'inability to speak the language of the law prevents him or her from knowing the experience as a legal event. This desire for knowledge is often expressed in the question, 'Do I have a case?',²⁶

In personal injury litigation, clients frequently do not know how to present their case in a legal form. In melodramatic terms, the clients do not know how to describe their virtue, how to blame the defendant, how to express their suffering or how to claim their rights. Without this knowledge, a client is 'legally mute'. The lawyer is required to give 'voice to the legally mute',²⁷ and is frequently the client's 'sole means of communicating with and participating in a proceeding' that may dramatically affect the client's life.²⁸ The plaintiff's mute role has a significant impact on many aspects of the personal injury trial, particularly in relation to proof of virtue and suffering. These areas are dealt with in more detail in the following chapters.

²⁶ C D Cunningham, 'A Tale of Two Clients: Thinking About Law as Language' (1989) 87 *Michigan Law Review* 2459, 2482.

²⁷ D Luban, "Lawyers and Justice: An Ethical Study" (1988) at 193-4 cited in W A Kell, 'Voices Lost and Found: Training Ethical Lawyers for Children' (1998) 73 *Indiana Law Journal* 635.

²⁸ *Ibid* 640.

6.2 Failure to Comply with the Plaintiff Role

A personal injury plaintiff's claim is most often unsuccessful because she or he is unable to meet the normative standards of the 'real' personal injury victim.²⁹ The plaintiff in the legal injury narrative has the best opportunity of success if she or he endeavours to maintain consistency and meet expectations about her or his role. However, some people are more likely to be able to fit the role than others. Plaintiffs who are unable, or choose not to, comply with the requirements of the role are at risk of losing the entitlements and compassion the role affords. In other words, personal injury clients may be punished for not possessing the qualities required by the legal narrative, much as women are often attacked by defence lawyers for not possessing the qualities of victimization required by the legal narrative of rape.³⁰

Similar qualities of victimisation are required of plaintiffs in disability rights cases, as Rovner points out:

For example, a plaintiff with a back injury or a heart condition may be able to demonstrate that she is an 'individual with a disability' within the meaning of the disability rights laws because she has a physical impairment that substantially limits, for example, the major life activities of walking, working, breathing, etc. Although such a person technically may meet the definition of an 'individual with a disability', a jury or other factfinder may also measure its perception of her (and, by extension, her claims) against the dominant cultural narrative of a disabled person. To the extent that the finder of fact believes, consciously or unconsciously, that the plaintiff does not 'look' or 'act' disabled enough in comparison to the dominant narrative, the plaintiff may be at risk for losing her claim of discrimination.³¹

In personal injury cases, where a plaintiff does not meet the judge's expectations with respect to the appropriate characteristics of a personal injury victim, whether specific to the person's response to the injury (compliance with the

²⁹ In the same way that a rape complainant's claim to victim-hood is denied most commonly through the legal construction and normalisation of a "real" rape victim: W Larcombe, *Compelling Engagements: Feminism, Rape Law and Romance Fiction* (2005) 64.

³⁰ Ibid.

³¹ L Rovner, 'Perpetuating Stigma: Client Identity in Disability Rights Litigation' [2001] *Utah Law Review* 247, 279.

plaintiff role), or more broadly with respect to his or her virtue in general (character specific attributes), this may adversely affect the plaintiff's claim. The following sections examine situations in which the injured person does not comply with the requirements of the plaintiff role. (The effect of character specific attributes are considered in Chapter 7).

6.2.1 Unusually Active Heroines in Melodrama

In melodrama the heroine's response to suffering is often panic and frenzy, subsiding into helpless despair.³² However, as Hyslop points out, not all of Pixérécourt's heroines are restricted to the role of passive feminine victim.³³ Some of them become actively involved in public and political situations which are normally the prerogative of men.³⁴ In a number of plays, Pixérécourt dresses his heroines in masculine attire, giving them the physical strength and courage normally confined to men, and allowing them to operate successfully in a male world. Léontine in *Charles-le-Téméraire* appears disguised as a knight in armour. She floods a marsh and drowns enemy soldiers and then fights, defeats and kills the villain. Hyslop argues that Léontine had special status as an atypical heroine and was not intended to subvert the dominant patriarchal structures of Pixérécourt's society. Rather it was to merely supply the audience with a frisson of change.

In the unusual case where the heroine is active, she is running away from the villain, or attempting to save others. For example, Rosemonde in *L'Homme à trois visages* disobeys her father and courageously confronts the governing body of men to defend her husband. In *La fille de l'exilé*, Elisabeth, at the age of sixteen, walks across Russia to petition the Tsar to restore her family to their rightful position in society. The heroine in question is never acting in order to alleviate her own suffering. Instead, her almost masculine strength is used altruistically, in order to restore to virtue her husband and father respectively. The heroine always engages in a long struggle (eg. *La fille de l'exilé*)³⁵, drawing

³² G Hyslop, 'Deviant and Dangerous Behaviour: Women in Melodrama' (1985) 19 *Journal of Popular Culture* 65, 67.

³³ Ibid 69.

³⁴ Ibid 73.

³⁵ Brooks, above n 2, 31.

on depleted reserves of strength and courage, and culminating in her total exhaustion and near collapse.³⁶

When the heroine does act, it is 'above her sex' (eg. *La fille de l'exilé* as described by Czar, III, xxiii)³⁷ or in the guise of a man. Where there is no male hero to assist her, the heroine, by adopting male clothing and the appearance of a man, is granted the masculine characteristics of physical strength and courage.³⁸ However, this transvestite role-playing is often used simply as a technique to encourage an audience to feel excitement at seeing these women in unexpected situations, and does not seriously undermine the normal melodramatic image of women as inferior to men.³⁹ Hyslop makes the important point that, despite their heroics:

it is ultimately men who enable them to achieve their noble aims. Both have to appeal to male judge figures, the Doge and the Tsar, and rely on the ability of these men to recognise virtue.⁴⁰

Accordingly, in melodrama the requirement that the character cast in the protagonist role be generally passive is not negated by the existence of some unusually active heroines. Just as a character who superficially fits the defendant role (who has been actively negligent) can be excused from the negative consequences of fitting that role if it can be shown that he acted for some altruistic reason, so can an unusually active heroine be excused from losing her entitlement to compensation if she acted in this manner for altruistic reasons or if the behaviour is seen as temporary. In a sense this heroine can be portrayed as having been active due to circumstances beyond her control, in a strange way almost a passive response.⁴¹

In the legal injury narrative characters who are too active to fit the passive plaintiff role are usually unsuccessful (or less successful) in their claims for compensation. The following sections consider the areas in which a plaintiff's

³⁶ M R Booth, *English Melodrama* (1965) 26 and 27.

³⁷ Brooks, above n 2, 27.

³⁸ G Hyslop, 'Deviant and Dangerous Behaviour: Women in Melodrama' (1985) 19 *Journal of Popular Culture* 65, 74.

³⁹ Ibid 76.

⁴⁰ Ibid 71.

⁴¹ See also later discussion in Chapter 7 about women who do not fit the stereotype but who are treated as if they do.

activity can prevent her or him from fitting the role, in particular activity in relation to causation and suffering.

6.2.2 Where the Plaintiff is Too Active - Causation

A plaintiff who is found to have been too active in the causation of her or his injury is likely to be held wholly or partially at fault. Although all plaintiffs are required to take some steps to take care of their own safety, this is generally expressed in a manner consistent with the passive plaintiff role. In other words, where the plaintiff is held to be at fault for her or his own injuries, this is usually in terms of the plaintiff actively choosing too little safety⁴², rather than passively accepting the status quo.

At the extreme end of the scale are plaintiffs who can be categorised as 'risk preferrers'.⁴³ These are people who actively place themselves in a situation of risk. In legal terms, a plaintiff who is active in this respect is likely to be denied a remedy according to the Latin maxim *volenti non fit injuria* ('to one who is willing no legal wrong is done'). At common law the courts limited the application of this defence to those whose assumption of the risk was truly voluntary, distinguishing between *scienti* (to one who knows) and *volenti* (to one who is willing or consents).⁴⁴ The plaintiff must have actually known of the risk, rather than simply be shown to have been in a position in which a reasonable person should have known of it. There must be a finding of fact that 'the plaintiff freely and voluntarily, with full knowledge of the nature and the extent of the risk he ran, impliedly agreed to incur it'.⁴⁵ Accordingly, in order to avoid liability the defendant must show that the plaintiff was indisputably active in exposing him or herself to the risk. Where there is any degree of passivity involved, the defence will not be available:

[A] man cannot be said to be truly 'willing' unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of

⁴² R L Abel, 'A Critique of Torts' (1990) 37 *UCLA Law Review* 785, 795.

⁴³ R L Rabin, 'The Historical Development of the Fault Principle: A Reinterpretation' (1981) 15 *Georgia Law Review* 925, 943.

⁴⁴ H Luntz and D Hambly, *Torts: Cases and Commentary* (5th ed, 2002) 402.

⁴⁵ *Letang v Ottawa Electric Ry Co* [1926] AC 725 at 731 (PC), citing *Osborne v London and North Western Ry Co* (1888) 21 QBD 220.

any feeling of constraint so that nothing shall interfere with the freedom of his will.⁴⁶

Historically, plaintiffs who were even slightly active in contributing to the risk were barred from recovery.⁴⁷ Luntz and Hambly suggested a number of reasons why contributory negligence was held to be a complete defence to an action based on negligence, one of which was the idea that the plaintiff must come to the court with 'clean hands'.⁴⁸ This sounds remarkably like the melodramatic requirement that the protagonist be virtuous (one of the characteristics of which is passivity).

The harshness of the rule was mitigated by the High Court in *Alford v Magee*.⁴⁹ The court pointed out that there were cases in which there was so substantial a difference between the position of the plaintiff and the defendant at the material time that it would not be fair or reasonable to find the plaintiff in any real sense the 'author of her own harm'.⁵⁰ The court gave four examples of this kind of situation:

- Where the defendant, and not the plaintiff, had a real opportunity of avoiding the accident.
- Where the defendant's negligent conduct was substantially later in time than the plaintiff's negligence, making it possible for the defendant to avoid the danger.
- Where the defendant has an advantage over the plaintiff because the defendant was master of the situation and chose to run a risk.
- Where the defendant had such an advantage over the plaintiff that the defendant ought to have been master of the situation but unreasonably failed to take advantage of the superior position.⁵¹

These mitigating circumstances are no longer relevant since the legislation introducing apportionment of damages for contributory negligence⁵²; however,

⁴⁶ Scott LJ in *Bowater v Rowly Regis Corporation* [1944] KB 476 at 479; [1944] 1 All ER 465 at 465 (CA).

⁴⁷ Lord Blackburn in *Cayzer, Irvine & Co v Carron Co* (1884) 9 App Cas 873 (HL) at 881.

⁴⁸ Luntz and Hambly, above n 44, 377.

⁴⁹ (1951-2) 85 CLR 437.

⁵⁰ F Trindade and P Cane, *The Law of Torts in Australia* (3rd ed, 1999) 562.

⁵¹ *Ibid* 562.

they identify the importance of the distinction between the active defendant and passive plaintiff. Where the modern defence of contributory negligence is argued, plaintiffs are frequently portrayed as being actively involved in subjecting themselves to the risk of injury.

6.2.3 Where the Plaintiff is Too Active - Suffering

Where a plaintiff fails to demonstrate a passive response to suffering, she risks losing any entitlement to compensation. Defendant lawyers often look for and emphasise evidence of the plaintiff's active behaviour as a reason for rejecting or reducing the plaintiff's claim for damages. Surveillance is often relied upon to show behaviour that is seen as an inappropriate response to alleged suffering, and to argue that the alleged suffering is not real. For example in the judgment in *Risteska v The Commonwealth of Australia*, the court noted:

Video tapes taken of the plaintiff under surveillance in May and June 1987 and in 1990 do not support her allegations of being restricted in her ability to walk or turn her head. They show her walking, driving a car, carrying a shopping bag, loading and unloading the boot of the car, all without apparent difficulty. They also show her in her backyard at the clothes hoist, winding the hoist, pegging the clothes out and so forth without apparent difficulty. They show her talking to others and socialising cheerfully.⁵³

Evidence of these activities was relied on to undermine the plaintiff's claim of suffering. The legal injury narrative reflects and reinforces the notion that action is incompatible with injury or suffering. This is frequently found in disability discrimination cases, in which a person who overtly tries to overcome the limitations they encounter risks being blamed for their invalid status or their failure to break free of it.⁵⁴ Rovner gives the example of *Rowley v American Airlines* in which Ms Rowley brought an action under the *Americans with*

⁵² There is now legislation in all Australian jurisdictions modeled on the *Law Reform (Contributory Negligence) Act 1945 (UK)*; *Law Reform (Miscellaneous Provisions) Act 1965 (NSW) Pt 3*; *Law Reform Act 1995 (Qld) Pt 3 Div 3*; *Wrongs Act 1936 (SA) ss27A*; *Wrongs Act 1954 (Tas) s4*; *Law Reform (Miscellaneous Provisions) Act 1955 (ACT) Pt V*; *Law Reform (Miscellaneous Provisions) Act 1956 (NT) Pt V*; *Law Reform (Contributory Negligence and Tortfeasor's Contribution) Act 1947 (WA)*.

⁵³ *Risteska v The Commonwealth of Australia* [1999] ACTSC 56.

⁵⁴ M Minow, 'Surviving Victim Talk' (1993) 40 *UCLA Law Review* 1411, 1429.

Disabilities Act, claiming that American Airlines had violated her civil rights by failing to provide her with a wheelchair to board her flight.⁵⁵ Although the jury in that case found that Ms Rowley's rights had been violated, they did not award any compensation. Rovner suggests that this was because at her trial, Ms Rowley did not look like the dominant cultural narrative of a 'helpless cripple'. Instead of appearing as someone whose disability had been a crippling misfortune that destroyed her life, she came across as a strong, independent woman who had coped well with her disability.⁵⁶ Rovner describes her client as an 'overcomer'.⁵⁷ According to Drimmer, the overcomer seeks to minimize the visible symptoms of her disability and deny that she is 'really disabled'.⁵⁸ Although this attitude is likely to be beneficial for people with disabilities in coping with their condition, it is likely to work against them when they are cast as the protagonist in a melodramatic narrative as it is inconsistent with the requirements of the role.

The legal injury narrative promotes the appropriate response to suffering based on the norm of a 'real' personal injury victim. This norm may not, however, fit the variety of characters who may be cast in the plaintiff role. Many people respond to suffering differently. Personal attributes and culture-specific expectations about male and female roles at work and in the home may affect the way a person deals with their injury. For example, immigrant women may still be required to perform their usual domestic tasks even though it might exacerbate their injuries. This might give rise to the allegation that they are responsible for the continuation of their suffering or be used as evidence that they are exaggerating their claim.⁵⁹ However, these plaintiffs often have little choice and are stuck in the invidious position of losing the respect of their family or losing their claim for compensation.

The only way that such behaviour can be accepted, without losing the required victim status, is if it can be shown to be an exceptional example of how human

⁵⁵ Rovner, above n 31.

⁵⁶ Ibid 281.

⁵⁷ J C Drimmer, "Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities" (1993) 40 *UCLA Law Review* 1341, cited in Ibid 265.

⁵⁸ Ibid 266.

⁵⁹ D Stewart, *Workers' Compensation and Social Security: An Overview* (1986) 80.

nature can conquer such crippling difficulties. In melodramatic terms, the plaintiff has acted 'above her sex', particularly where the motivation behind this feat was her responsibilities to others (such as children).

6.3 Overdoing the Role - the Paradox of Passivity

Although passivity is a required attribute of the character cast in the plaintiff role, demonstrating passivity can be a double-edged sword. There is a fine line between being passive and *actively choosing to remain passive*. This paradox of passivity is found in relation to the plaintiff's involvement in the causation of the injury and the plaintiff's response to suffering.

In relation to causation, the requirement of passivity can sometimes work against a character cast in the plaintiff role. Schlanger's study of cases involving injuries to women between 1860 and 1930 demonstrates a particularly gendered application of the paradox of passivity. She suggests there was a tension for women who were injured while passengers in private cars driven by men in that:

In order to recover...[a female passenger] had to claim that she was not in control of the car, because that might suggest a joint enterprise or agency relationship and accordingly defeat recovery. At the same time, if she asserted too vehemently her own lack of control, she ran the risk of being judged to have trusted so completely to the care of the man driving as to constitute contributory negligence.⁶⁰

This kind of tension is still evident in recent personal injury judgments, although it is implicit rather than expressed. The paradox of passivity is most obvious in relation to the plaintiff's response to suffering.

Plaintiffs must also not be overly passive in response to their suffering or they run the risk of being seen as contributing to their own suffering. Plaintiffs have a responsibility to take some steps to attempt to alleviate their suffering. Where plaintiffs are too passive they may be characterised as victims-as-manipulators: disingenuous, manipulative and self-serving.⁶¹

⁶⁰ M Schlanger, 'Injured Women before Common Law Courts, 1860-1930' (1998) 21 *Harvard Women's Law Journal* 79, 102.

⁶¹ Rovner, above n 31, 293.

The victim-as-manipulator role has gained increasing popularity in the last decade, with respect to both people with disabilities and personal injury plaintiffs. Lennard Davis suggests that this may stem from Freud's notion of the disabled as narcissistic – the 'familiar egoism of the sick person'.⁶² However it is also no doubt related to a general growing intolerance for 'lack of personal responsibility' and what has been described as 'a culture of victimization', reflecting:

a readiness not merely to feel sorry for oneself but to wield one's resentments as weapons of social advantage and to regard deficiencies as entitlements to society's deference.⁶³

With public perceptions of increasing instances of personal injury litigation and dramatically escalating awards of damages, the issue of malingering is a topical one. Current affairs television programs regularly feature exposés of fraudulent personal injury litigation plaintiffs. Valerie Hans's interviews with civil jurors revealed that they often worried about trumped-up claims and fraudulent or exaggerated injuries. Jurors with these concerns tended to blame the victim.⁶⁴

This reversal of roles from the plaintiff-as-victim to the defendant-as-victim may be inherent in the nature of the plaintiff role in the adversarial context of the legal injury narrative. Martha Minow points out that the rhetoric of victimization leads to two common responses from the person accused: 'I didn't do it' and 'I'm the real victim here.'⁶⁵ This later response, and the fear of the victim-as-manipulator, is evidenced in the case of *Hallmark-Mitex Pty Ltd v Rybarczyk*.⁶⁶ In that case the plaintiff alleged that her employer should have warned her of the risk of carpal tunnel syndrome inherent in her work as a sewing machinist. The defendant employer argued that 'giving a warning in the terms contended for could reasonably be expected to lead to an increase in the number of complaints of the syndrome wrongly attributed to the appellant's system of work, thus leading to disruption, inconvenience and unnecessary expense in investigating

⁶² L Davis, 'Bending over Backwards: Disability, Narcissism and the Law' (2000) 21 *Berkeley Journal of Employment and Labour Law* 193, 196.

⁶³ C J Sykes, "A Nation of Victims", 1992 at 12, cited in Rovner, above n 31, 293. See also A M Dershowitz (1994). "The Abuse Excuse". Little, Brown & Co: Boston; VP Hans, 'Whiplash: Who's to Blame?' (2003) 68 *Brooklyn Law Review* 1093.

⁶⁴ Hans, above n 63, at 1095.

⁶⁵ Minow, above n 54, 1413.

⁶⁶ [1997] QCA 11009.

those complaints and, perhaps, defending claims'. In other words the employer argued that warning of a known risk may have actually encouraged employees to falsely claim that the risk had in fact arisen. There may also have been some underlying racism based on the fact that many of the employees in question were immigrants and potentially fit the stereotype of the malingering immigrant (see following).

In personal injury litigation the classic victim-as-manipulator is the malingerer. An Australian Medical Association survey in 1981 claimed that nearly half of all compensation cases involve plaintiffs who are either faking or grossly exaggerating their disability⁶⁷, or in other words, malingering. The *Diagnostic and Statistical Manual of Mental Disorders*, fourth revision (DSM-IVTR) defines malingering, or intentional distortion, as 'the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution or obtaining drugs'. This definition also includes the stipulation that, 'malingering should be strongly suspected if any combination of the following is noted:

- The presence of Anti-Social Personality Disorder.
- Medicolegal context of presentation (e.g., The person is referred by an attorney to the clinician for examination)
- Lack of cooperation during the diagnostic evaluation and in complying with the prescribed treatment regimen
- Marked discrepancy between the person's claimed stress or disability and the objective findings'.⁶⁸

Malingering includes both outright fraudulent claims and exaggeration of symptoms in legitimate claims. However, if a plaintiff can carefully balance the paradox of passivity, he or she may be found not to be a malingerer, but to suffer from compensation neurosis. Compensation neurosis involves a personal injury plaintiff's inclination to maintain and even emphasise the sick role for an

⁶⁷ Cited in A J Gilandas and S W Touyz, 'The Neuropsychologist as an Expert Witness' (1982) 17 *Australian Psychologist* 255, 262.

⁶⁸ *Diagnostic and Statistical Manual of Mental Disorders*, 4th Ed, (1994)

increased prospective gain in compensation.⁶⁹ It is a recognised psychological condition, in contrast with the fraudulent nature of malingering. The plaintiff is unable to psychologically move on until the litigation is over, and the adversarial nature of the litigation itself exacerbates the victimisation.⁷⁰ If compensation neurosis can be established, it does not take away from the plaintiff's legitimate victim role and compensation is usually awarded.

The malingerer is a performer, pretending to fit the role of heroine/victim, rather than actually living it. Accordingly, it is important to 'unmask' the malingerer to ensure that he or she is cast in an appropriate role so that justice is done. The decision about whether or not a personal injury plaintiff is a malingerer is a factual one and detection is largely based on the judge's common sense, rather than expert evidence. Although expert scientific evidence is often used to assist in the detection of malingering, the differences between the objectives, methodologies and definitions of truth in the cultures of science and law often led to uncertainty and difficulty in these efforts.⁷¹ Expert evidence of malingering can take a variety of forms. Direct evidence may be led by an expert medical witness to the effect that plaintiffs' testimony about their abilities is inconsistent with their demonstrated behaviour. Indirect evidence may also be lead about the typical symptoms of certain claimed injuries or illnesses and about different psychological syndromes.

As previously mentioned, paradoxically a finding that the plaintiff has been too passive can equate to a finding that the plaintiff has actively chosen to continue to suffer. A finding of malingering thus prevents the plaintiff fitting the victim role, as the person is no longer passive in the sense of having no responsibility for his or her condition. This aspect of the invalid role can often form the basis for strongly contested personal injury litigation, such as the Western Australian decision of *Bakovic v Rosebridge Nominees Pty Ltd*.⁷² Ipp J, summarising the parties' evidence in relation to quantum, stated:

⁶⁹ D Butler, 'An Assessment of Competing Policy Considerations in Cases of Psychiatric Injury Resulting from Negligence' (2002) 10 *Torts Law Journal* 13, 27.

⁷⁰ *Ibid*.

⁷¹ S I Friedland, 'Law, Science and Malingering' (1998) 30 *Arizona State Law Journal* 337, 341.

⁷² [1999] WASCA 78, Ipp, Owen and Steytler JJ.

The appellant led medical testimony to the effect that her condition was unlikely to improve in the near future, and there was a prospect that she would never improve to the extent that she would be able to work again. The respondent, on the other hand, contended that the appellant was deliberately feigning her symptoms and, at the time of trial, she was well able to live a normal life and her capacity to work was not affected.⁷³

The respondent relied heavily on comments by its medical witness, a psychiatrist, who gave evidence that the appellant could cease her 'sick role' by 'a mere voluntary exercise of will on her part'.⁷⁴ The appellant relied on medical evidence that she had a psychological disorder 'over which [she] had no control'.⁷⁵

In *Risteska v The Commonwealth of Australia*⁷⁶ the fact that the plaintiff did not show an intention to attempt another position with lighter duties appeared to be held against her, even though her former employer had not offered her any such position. Miles CJ stated in his judgment:

Dr Heathershaw also recommended that the plaintiff be offered full duties in the proof packing area of the Mint where there was no heavy lifting or repetitive bending. It is not clear that the plaintiff was ever offered these duties and the onus on these issues are on the defendant. However, it is clear that the plaintiff did not believe that she was capable of carrying out such duties and did not intend to try. She still does not intend to do so.⁷⁷

Accordingly, the successful plaintiff must carefully tread the fine line between being passive while still demonstrating a desire to overcome suffering, and being too passive.⁷⁸

⁷³ At para 3.

⁷⁴ At para 4.

⁷⁵ At para 16.

⁷⁶ [1999] ACTSC 56.

⁷⁷ *Risteska v The Commonwealth of Australia* [1999] ACTSC 56 at para 42.

⁷⁸ This tension is often vividly displayed in "Day in the Life" videos of personal injury victims, in which directors overtly aim to portray the plaintiff as attempting to overcome her difficulties, but failing to do so: Feigenson, personal communication.

6.4 Character and Role Fit

*In so far as activity remains equated with masculinity and passivity with femininity, the destiny of characters [in melodrama] whether male or female, is unrealisable; he or she can only live out the impairment ('castration') imposed by the law. In their struggle for the achievement of social and sexual demands, men may sometimes win through, women never.*⁷⁹

In a fictional melodrama the characters can be created specifically for the role in which they are cast. Whether or not the character in the protagonist role is a female, male, adult, or child, they will generally demonstrate the required attributes of femininity. However, in the legal injury narrative the various characters who are, from time to time, cast in the plaintiff role, come to the role with a wide range of attributes. Some will find it easier than others to conform to the role. Men, women and immigrants all face particular issues when cast in the plaintiff role.

In melodrama, where a female plays the protagonist role, she remains subjected to male characters throughout the story. Initially, in the state of virtue, she is subject to the power of good male characters, such as the father-figure. She is safely and happily within their power as it is for her own well-being. She then becomes subject to the power of an evil male character, the villain. Finally, she is rescued by good male characters such as the hero and judge. Accordingly, the heroine remains subjected in one way or another to male characters throughout the story. In this sense, the heroine's passive role does not change.

In contrast, where a male is cast in the protagonist role, the story is about the male escaping from the feminine role and transforming into a more appropriate masculine one. The male character may begin in a feminine role (for example, because he is a child) or may be forced into a feminine role from a pre-existing masculine one (for example, because of disabling injury).

Generally speaking, according to sex role theories, men are expected to engage in stereotypically masculine activities. What is defined and valued as masculine varies over time and cultures, and is 'deeply enmeshed in the history of institutions and of economic structures'.⁸⁰ However, no matter how the masculine and the feminine are defined, at any given time men who demonstrate

⁷⁹ G Nowell-Smith, 'Minnelli and Melodrama' (1977) 18 *Screen* 105, at 116.

⁸⁰ R W Connell, *Masculinities* (1995), Allen & Unwin, Sydney, 29.

feminine characteristics are condemned as aberrant by the dominant culture.⁸¹ Accordingly, when a male is cast in the feminine plaintiff role, his weakness is seen as a stark contrast to his 'normal' strong self and is often presented as a source of considerable frustration.

In contrast, the plaintiff role is, in many respects, reflective of the accepted feminine role of women in everyday life. The male/female power imbalance is an inherent part of the patriarchy, in which 'being male itself confers power and ... being female itself confers powerlessness.'⁸² Tuerkheimer argues that women have been socialized to be weak, passive and mute, and to seek help from men in times of need.⁸³ Accordingly, it may not be as difficult for a female plaintiff to conform to the feminine nature of the plaintiff role.⁸⁴

This distinction becomes important with respect to the value placed on the suffering of male and female plaintiffs. Where a female plaintiff is portrayed as suffering in a stereotypically feminine way, her suffering is consistent with her melodramatic heroine role. There is nothing unexpected here. Women who are cast as passive, weak and mute heroines suffer in passive, weak and mute ways. However, where a male is cast in the heroine plaintiff role, there is discord. A man, normally seen as active, strong and articulate, is injured and unable to fulfil his 'normal' male role. In addition to this, in the legal injury narrative he is suddenly cast in a suffering heroine role and thus doubly emasculated. In this way a male plaintiff's suffering is more visible. This may be a factor explaining the often quoted suggestion that men tend to receive higher awards of compensation than women.⁸⁵

Gender differences may also arise where a plaintiff's physical injuries result in a need for care and assistance from others. The requirement for care is seen as a greater source of suffering for men, given that 'the dominant male culture

⁸¹ R West, 'Jurisprudence and Gender' (1988) 55 *University of Chicago Law Review* 1, 38.

⁸² D Tuerkheimer, 'Street Harassment as Sexual Subordination: The Phenomenology of Gender-Specific Harm' (1997) 12 *Wisconsin Womens Law Journal* 167, 172.

⁸³ Ibid 192.

⁸⁴ It might be interesting to examine whether male plaintiffs have poorer health outcomes than female plaintiffs for this reason.

⁸⁵ Interestingly, the Australian literature that refers to the phenomenon of female personal injury plaintiffs receiving lower damages awards than male plaintiffs either make assumptions about inequity, or discusses a particular case where the damages awarded seem to be inequitable and then makes general assumptions about this being a pattern. See for example Graycar & Morgan (2002).

condemns as aberrant the man who needs others.⁸⁶ However, reliance on others is seen as a natural part of being a woman, and something that is generally valued as a source of connection. Accordingly, this dependence is not seen as significant with respect to the female plaintiff's suffering.

Like women, injured immigrants are often easily cast in the plaintiff role. In the same way that the characteristic of weakness is frequently assumed with respect to female plaintiffs, it is also often part of the stereotype of the immigrant. Immigrants can easily be seen as the natural victims of a hostile world. Many immigrants are leaving a hostile place to come to Australia. They then frequently find Australia to be hostile towards them in other ways. Newly arrived immigrants have restricted rights and they are often unfamiliar with the intricacies of Australian society and culture. For these reasons, immigrants are commonly described as people in need of protection and assistance. The government acknowledges this by providing settlement support including English language programs, programs facilitating access to employment, interpreting services, pre- and post-arrival information, orientation programs and accommodation assistance.⁸⁷ Immigrants' position in society is thus one which commands protection, in much the same way as the melodramatic heroine's domestic position commands protection.

Immigrant workers, for example, unfamiliar with the culture and practices of the Australian workplace, have a particular need for instructions, warnings and assistance. They are also less likely to be able to call into question their employer's conduct than their Australian-born counterparts. This may be due to language barriers, or simply because of their fear of losing their employment.

In addition, many immigrant plaintiffs have particular beliefs with respect to what is appropriate treatment for their injuries. When the notion of appropriateness is determined by reference to an objective standard of reasonableness based on specific cultural values, an immigrant may be significantly disadvantaged.⁸⁸ Although the standard has been modified to take

⁸⁶ R West, 'Jurisprudence and Gender' (1988) 55 *University of Chicago Law Review* 1, 38.

⁸⁷ ALRC Report on Multiculturalism, p.76.

⁸⁸ K Laster, 'Migrants and the Duty to Mitigate Damages for Personal Injury' (1982) 7 *Legal Service Bulletin* 249, 249.

into account ethnic characteristics of immigrants⁸⁹ there are still problems when the court generalises about the belief systems of ethnic communities rather than addressing the subjective beliefs of the particular individual.⁹⁰ Multiculturalism can be converted into a paternalistic acknowledgement that 'difference' is equivalent to diminished legal responsibility and subtle discrimination.⁹¹

Whether or not a particular character easily fits the plaintiff role affects the outcome of their case. Where characters are unable to fit the role they may be unsuccessful. Where they have some difficulty fitting the role but can adapt to minimise inconsistencies, they may be successful but have their compensation reduced. However, even where characters find it easy to conform to the role, there may be negative consequences. For example, women who are stereotyped as normally passive and dependent may not be seen to have suffered significantly as a result of their injuries and as such may not receive as much compensation as a male plaintiff in similar circumstances. As such, the legal injury narrative can contribute to reinforcing existing stereotypes and continuing discrimination.

6.5 Consequences of Fitting the Role

Although fitting the plaintiff role may assist a plaintiff to achieve dream justice through the resolution of the legal injury narrative, it is likely to have other consequences that impact negatively on the plaintiff's health outcomes. These may include stigmatisation and the loss of a positive self-image, and the development of inappropriate illness behaviour.

When a person is involved in an accident and suffers an injury, his or her existing belief system is also challenged. There are three common assumptions that are challenged by accidents and injuries. Firstly, people generally assume that the world is benevolent and that good triumphs over evil. Secondly, people usually see the world as meaningful, in that people usually get what they deserve, and that their actions can be explained by their characters. Thirdly, most people believe in the worthiness of the self, or the fact that people are generally 'good' and accordingly are inherently entitled to the benefit of the benevolence of the

⁸⁹ *Glavonjic v Foster* [1979] VR 536; *Karabotsos v Plastex Industries Pty Ltd* [1981] VR 675.

⁹⁰ Laster, above n 883, 250.

⁹¹ *Ibid.*

world.⁹² However, when people's lives are interrupted by an accident and resulting injury, they often need to reassess these basic assumptions in the context of their life narratives.⁹³ This need to reassess makes injured people vulnerable to be influenced by a dominant narrative of plaintiff identity in the legal injury narrative. The problem with having to reinterpret the injurious experience in a negative way is that the person is likely to replace their prior life narrative (or basic assumptions about life and their role in it) with one based on new assumptions such as 'the malevolence of the world and people, the meaninglessness and randomness of the world, and the unworthiness of the self'.⁹⁴ This can give rise to a negative redefinition of identity and detrimental effects on the healing process.

Concepts of self and identity are formed in the personal narratives people use to give meaning and completeness to their lives. Life narratives are constantly developed and revised as new events occur. In this way, one's concept of self is not static, and life-narratives develop from both the past and expectations for the future.⁹⁵ When social settings provide stock roles to guide behaviour (such as the plaintiff role in the legal injury narrative) and reward those who comply, people tend to adopt those roles, even when they may appear to be inconsistent with an individual's lived experience.⁹⁶ This effect is magnified when the story is required to be retold publicly, irrevocably, consistently and under cross examination, as happens in personal injury litigation. This activates several 'cognitive, social and motivational forces that can move self-views in line with the attitudes and attributes' implied by the requirements of the narrative.⁹⁷

Accordingly, when a person is required to tell their injury story in terms of the legal injury narrative, any tension between those two versions of events can motivate the person to alleviate any inconsistency by adopting the legal injury narrative as their own. Their role in the narrative, and the characteristics of that

⁹² R Janoff-Bulman and C E Thomas, 'Self-Defeating Responses Following Victimization' in R C Curtis (ed), *Self-Defeating Behaviors: Experimental Research, Clinical Impressions, and Practical Implications* (1989) 215, 218.

⁹³ Ibid 217.

⁹⁴ Ibid 225.

⁹⁵ D E Polkinghorne, *Narrative Knowing and the Human Sciences* (1988) 150.

⁹⁶ Ibid 153.

⁹⁷ D Cioffi in T F Heatherton et al (eds), *The Social Psychology of Stigma* (2000) 200. This is also quite similar to cognitive dissonance theory.

role, may be internalized, becoming 'indistinguishable at a psychological level from other disguises of the self'.⁹⁸ Presenting oneself in accordance with these predefined roles can change the future development of one's life-narrative. As Carr points out, when people are explaining themselves to others they are 'often trying to convince [themselves] as well'.⁹⁹

The successful plaintiff is frequently stigmatised because of the negative value attached to the plaintiff role. A person who is stigmatised is 'a person whose social identity, or membership in some social category, calls into question his or her full humanity – the person is devalued, spoiled, or flawed in the eyes of others'.¹⁰⁰ It is inherent in the legal injury narrative that the plaintiff is unable to perform his or her socially approved roles. These roles, based on physical ability in general, and in specific contexts such as the home and workplace, are valued by society and accordingly, the disabled state becomes valueless.

Stigmatisation also often involves the depersonalization of others into stereotypical caricatures.¹⁰¹ To stigmatize an individual is to 'define' the individual in terms of this negative attribute, and then to devalue him or her in a manner 'appropriate' to this label.¹⁰² Successful personal injury plaintiffs are often defined and stigmatised by their inabilities, rather than their abilities. They serve as 'a constant reminder to those temporarily normal of what they try to avoid, forget and ignore: fear, pain, illness and limitation.'¹⁰³ The message that people with disabilities are 'ruined' has been reinforced throughout history by the media, artistic works, literature, films and even our language.¹⁰⁴ This stereotype is reinforced by the legal injury narrative. The law itself treats people with disabilities as 'intrinsically substandard'.¹⁰⁵ In some cases, personal injury

⁹⁸ J T Noonan, *Persons and Masks of the Law: Cardozo, Holmes, Jefferson and Wythe as Makers of the Masks* (1976) 21.

⁹⁹ D Carr, "Life and the Narrator's Art" in H J Silverman and D Idhe (Eds) *Hermeneutics and Deconstruction* (1985) 108-121, referred to in Polkinghorne, above n 95, 151.

¹⁰⁰ Crocker, J, Major, B and Steele, C, "Social Stigma", in D. Gilbert, S. T. Fiske and G. Lindzey (Eds.), *Handbook of Social Psychology* (4th ed, 1998) 504, quoted in T F Heatherton et al (eds), *The Social Psychology of Stigma* (2000) 1.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ A Smith, 'Persons with Disabilities as a Social and Economic Underclass' (2002) 12 *Kansas Journal of Law and Public Policy* 13, 24.

¹⁰⁴ Rovner, above n 31, 262.

¹⁰⁵ Drimmer, above n 57, 1344.

plaintiffs may adopt this characterisation as part of their own identity, changing the way that they think about themselves and their own self worth.

There are also sometimes emotional compensations (and even rewards or enticements) in going under, in being defeated or overwhelmed or victimized: 'One is saved the troublesome pains of responsibility for evil, of choice among unclear options, ... [one can easily] yield to the lure of passivity'.¹⁰⁶ Claiming remedies or entitlements on the basis of victim status gives individuals a stake in their victimization.¹⁰⁷ The fact that the injured person is rewarded by complying with the victim role places extra pressure on them to redefine themselves and their relationships in accordance with that role. Similar constraints in the legal injury narrative may encourage the injured person to assume characteristics of the appropriate plaintiff which are not part of the injured person's own injury narrative. 'The language of victimization invites people to treat victimhood as the primary source of identity',¹⁰⁸ but the role of innocent victim is 'utterly inconsistent with an image of a whole, autonomous, integrated human being who is worthy and deserving of respect'.¹⁰⁹ Pity involves a moral requirement to respond to innocent suffering, but also superiority, self-righteousness and power.¹¹⁰ The plaintiff must struggle to 'reconcile a positive self-image with the image of the victim as powerless and defeated'.¹¹¹

Playing the passive plaintiff role can have a kind of self-fulfilling quality by threatening the sense of control that allows a person to cope with injurious experiences. This limits the scope for the plaintiff to resolve some aspects of his or her own suffering, by focusing on the judge as the dispenser of dream justice, rather than the plaintiff having any independent control of his or her own destiny. This is supported by studies of rape victims who recover faster and more fully by disidentifying themselves from stereotypical victim roles.¹¹² The 'psychological

¹⁰⁶ R B Heilman, *Tragedy and Melodrama: Versions of Experience* (1968) 86.

¹⁰⁷ J Taylor, "Don't Blame Me! The New Culture of Victimization", New York, 3 June 1991, at 33, quoted in Minow, above n 54, 1430.

¹⁰⁸ Ibid 1433.

¹⁰⁹ Rovner, above n 31, 290.

¹¹⁰ Ibid 289.

¹¹¹ Bumiller, cited in Ibid 300.

¹¹² D W Shuman, 'The Psychology of Compensation in Tort Law' (1994) 43 *Kansas Law Review* 39, Referring to N West, Note, 'Rape in the Criminal Law and the Victim's Tort Alternative: A Feminist Analysis' (1992) 50 *University of Toronto Faculty Law Review* 96, 114.

temptations' of invalid status¹¹³ tend to result in a loss of individual power by discouraging people who are categorised as invalids from developing their own strengths or working to resist the limitations they encounter.¹¹⁴

Fitting the plaintiff role in the legal injury narrative can lead injured plaintiffs towards a situation of learned helplessness. Learned helplessness occurs when 'a person ... displays inappropriate passivity: failing through lack of mental or behavioural action to meet the demands of a situation where effective coping is possible. [It is] mediated by particular cognitions which are acquired during a person's exposure to uncontrollable events and then inappropriately generalized to new situations'.¹¹⁵ Learned helplessness is often encouraged and developed in situations where the person is initially 'rewarded for passivity and/or punished for activity'.¹¹⁶ The person does not learn the helpless behaviour, they in fact develop the expectation that they will have no control over situations that arise in the future, and helpless behaviour is a natural consequence of this belief.¹¹⁷ The plaintiff role, characterised by passivity and dependence on others, seems an ideal foundation for the development of learned helplessness.

Adopting the plaintiff role is also concerning given the often self-defeating patterns of thought and behaviour associated with the role. Describing oneself as a victim has a self-fulfilling and self-perpetuating feature.¹¹⁸ People who are subjected to victimization often develop self-defeating behaviors. Rather than looking forward and attempting to cope with 'the exigencies of daily existence, victims frequently find themselves looking back and continually re-experiencing the event, reliving the unpleasantness and suffering as a result.'¹¹⁹ Given that attention directed to pain typically exaggerates its aversiveness,¹²⁰ and that

¹¹³ Minow, above n 54, 1419.

¹¹⁴ Ibid 1429.

¹¹⁵ C Peterson and L M Bossio, 'Learned Helplessness' in R C Curtis (ed), *Self-Defeating Behaviors: Experimental Research, Clinical Impressions, and Practical Implications* (1989) 235, 240.

¹¹⁶ Ibid.

¹¹⁷ Ibid 241.

¹¹⁸ Minow, above n 54, 1431.

¹¹⁹ Janoff-Bulman and Thomas, above n 92, 215.

¹²⁰ Pennebaker, J W and Epstein, D. 'Implicit psychophysiology: Effects of common beliefs and idiosyncratic physiological responses on symptom reporting' (1983) 51 *Journal of Personality* 468.

recalling a negative experience can lead to decreased global self-esteem,¹²¹ it does not seem surprising that litigants tend to have poor health outcomes.

The legal injury narrative encourages this type of self-defeating behaviour by requiring the plaintiff to remain fixed on the accident and its negative consequences. Without a hopeful story about the future, the plaintiff may undergo 'a second kind of unhappiness, a life without hope.'¹²² The following quote from the judgment of Miles CJ in *Risteska v The Commonwealth of Australia*¹²³ nicely illustrates this point:

But with her injury and its immediate consequences, it is likely that the plaintiff saw this comfortable world fall apart. Her self-esteem as a member of the workforce and as a household manager and parent appears to have deserted her almost immediately after the injury when she was cast into the image of an invalid with a variety of medications, a cervical collar, stuck at home with the children doing the work.

Complying with the plaintiff role may encourage plaintiffs to consciously maintain those characteristics, by exaggerating their injuries and malingering,¹²⁴ but there may also be subconscious changes. In the legal injury narrative the injured person has a stake in their own victim status and this can lead to the phenomenon of secondary gain. A secondary gain is 'an advantage accruing subsequent to an illness or accident, which plays a part in creating and/or perpetuating' that illness or injury.¹²⁵ Secondary gain is different from malingering, in that the injured plaintiff is not consciously aware of the role of the advantage in the perpetuation of the illness or injury.¹²⁶ This may even give rise to a new source of invalidity, even one which amounts to a compensable head of damage, such as inappropriate illness behaviour. For example, in *Risteska v The Commonwealth of Australia*¹²⁷ it was found that the 'role of litigation or possible litigation as a contributory factor in the plaintiff's condition began at a

¹²¹ Levine, Wyer & Schwarz, "Are you what you feel? The affective and cognitive determinants of self-judgments" (1994) 24 *European Journal of Social Psychology* 63-77.

¹²² Polkinghorne, above n 95, 107.

¹²³ [1999] ACTSC 56.

¹²⁴ S D Sugarman, 'Doing Away with Tort Law' (1985) 73 *California Law Review* 558, 586.

¹²⁵ L Keiser, *The Traumatic Neurosis* (1968) 52. Quoted in D W Shuman, 'The Psychology of Compensation in Tort Law' (1994) 43 *Kansas Law Review* 39.

¹²⁶ *Ibid* 52.

¹²⁷ *Risteska v The Commonwealth of Australia* [1999] ACTSC 56.

very early stage' and that 'she became the beneficiary, perhaps in the end the victim, of the compensation scheme and later the medico-legal system'.

6.6 Conclusion

In this chapter I have shown that the legal injury narrative encourages the idea that suffering is necessary by offering acceptance of future justice, fostering in believers an attitude of resignation, and robbing them of energies needed to fight present injustices.¹²⁸ It also encourages passivity as the appropriate response to suffering.

The feminine nature of the plaintiff role requires the plaintiff to demonstrate qualities of passivity and dependence, in relation to the injury, suffering and the resolution of the narrative. This has the potential to encourage people to rely too heavily on others, rather than taking care of their own wellbeing and rehabilitation. The requirement that the plaintiff submit to others can lead to a loss of control and dignity for the injured person, and in some cases can result in an injured person succumbing to the temptations of victim status and lead to a negative self-image. This may help explain the poorer health outcomes of litigants.

Where an injured person fails to comply with the plaintiff role, she may be denied compensation. However, there is a fine line between fulfilling the requirements of the role and overdoing it. The legal injury narrative gives rise to a paradox of passivity, in which plaintiffs must be sufficiently passive to avoid being blamed for their own injury and suffering, and yet not too passive in order to avoid being characterised as a malingerer.

The requirements of the plaintiff role have different consequences for male, female and immigrant plaintiffs. Feminine characteristics may be more readily attributed to women and immigrants, who may therefore fit the plaintiff role more easily than non-immigrant men. However, this can impact negatively on their compensation, as they may not be seen to have suffered sufficiently to demonstrate a clear difference in their pre- and post- injury states. In contrast, male plaintiffs may appear to have suffered more greatly, when they are cast in a

¹²⁸ Reflective of Camm's criticism of Christianity, discussed in Maria Aristodemou, *Law and Literature: Journeys from Her to Eternity* (2000) 135.

feminine role so starkly different to their stereotypical masculine character. These distinctions also emphasise the power difference between those with stereotypically masculine characteristics and those with stereotypically feminine characteristics, reinforcing the fact that the masculine characters are generally the holders of power and authority, and that masculinity is the valued state in society.

Chapter 7

Recognition of Virtue

Introduction

Earlier chapters have established that melodramatic characters are either virtuous or evil, and that in the legal injury narrative the plaintiff role should be filled by a virtuous character. This chapter considers the attributes of virtue valued by the legal injury narrative, and how those attributes vary for different types of characters who may fill the plaintiff role. It also considers the impact of the assessment of virtue on those characters and whether this impact may give rise to negative consequences for those characters' well being. This chapter aims to demonstrate that the legal injury narrative creates a particular version of virtue, defined and enforced by the patriarchal hierarchy.

Virtue is normative and assessments of virtue are made in light of what is valued in the status quo, resulting in the perpetuation of existing inequalities and discrimination. In particular, these normative values reinforce the value of the masculine over the feminine and they discriminate against those individuals who cannot, or choose not to, comply with the required attributes of virtue. The legal injury narrative distributes relief from suffering based on a predetermined notion of deservedness. Whether or not someone is deserving is a decision made and imposed by a paternalistic masculine judge. It is also frequently made on the basis of stereotypes rather than a detailed assessment of an individual's complexity. In some cases, the assessment of a plaintiff's virtue can impact negatively on their case even where it is totally unrelated to the injury.

This chapter identifies the attributes of virtue in melodrama and how they are applied in the legal injury narrative. The chapter then examines how those notions of virtue are intrinsically linked to assessments of the plaintiff's suffering. The connection between virtue and the melodramatic notion of undeserved harm is also discussed in detail.

7.1 Melodrama and Virtue

Melodrama is about 'virtue made visible and acknowledged, the drama of a recognition'.¹ The concept of virtue is inherently linked to melodrama's aim of restoring the status quo of the social order. What is virtuous is what is consistent with that which is valued in the existing society. Thus, when virtue is recognised, melodrama in fact recognises what is valued in the status quo. This value is reinforced by rewarding the bearer of that value.

In melodrama, the heroine's virtue is called into question by the villain, following which she is no longer able to fill her valued social role. The heroine is unable to reinstate her own social position, and she is thus dependent on the father figure to recognise her virtue and restore her to her rightful place. This dependence is a necessary consequence of the basic feminine nature of the heroine role. Masculine characters in melodrama are required to demonstrate a level of paternal care for feminine characters. However, feminine characters are only entitled to paternal care if they are deserving. With this in mind, masculine characters are cautious not to be taken advantage of by those who might not be virtuous. For example, in *Coelina* when Dufour is deliberating whether or not he should continue to extend his charity to Francisque (who is feminine in the sense that he is mute, poor and depends on others for his welfare), he argues against doing so based on the fact that Francisque's need may have been caused 'by his own fault as it is with so many'. However, once Dufour establishes that Francisque is in fact an innocent victim, he relents and allows him to stay. (A privilege that is later very quickly removed when Dufour comes to believe that Francisque has dishonoured his brother).

Whether or not a character is virtuous is a decision that can only be made by the father-figure, who has authority and power to declare or deny virtue. Accordingly, feminine virtue is defined according to what the masculine characters value in a feminine character. Melodrama effectively silences any alternative values because it is 'articulated within the dominant essentialist discourse...[and provides] escapist controls that support and solidify the political

¹ P Brooks, *The Melodramatic Imagination* (1976) 13.

status quo'.² Melodrama 'legislate[s] the regime of virtue'³ as defined by the patriarchal hierarchy.

In practical terms, the heroine's assessment of her own virtue, or the value of her social role, is irrelevant. This is not so obvious in most melodramatic theatre, in which the characters are monopathic and never challenge their role. However, this can create issues in personal injury litigation, where an individual may not easily fit the role which he or she is required to play in the legal injury narrative. Along with harm to virtue being a cause of suffering, virtue is also a prerequisite to having one's suffering alleviated. Non-virtuous characters may well suffer (for example, a villain may suffer while imprisoned in a cold and uncomfortable dungeon), but this is not seen as undeserved harm. Only a vivid display of undeserved harm stimulates pathos.

7.2 Virtue and the Legal Injury Narrative

Existing scholarship on negligence law and personal injury litigation focuses largely on behavioural standard-setting in relation to the defendant. However, examining the law's narrative about personal injury as melodrama brings to the fore the implicit behavioural standard-setting with reference to the plaintiff. It appears that the plaintiff's moral virtue is relevant to the decision maker even if this is not legally relevant. This is most evident in relation to juries, but it seems likely that it is also implicitly considered by judges, although they would be less likely to express it. The legal injury narrative thus reveals some of the implicit norms about virtue and the plaintiff, and also raises interesting questions about who decides the criteria of virtue for particular types of characters cast in the plaintiff role.

The melodramatic requirement that the plaintiff demonstrate virtue (and therefore undeserved suffering) is evidenced most clearly in studies of juror decision making. For example, Valerie Hans's study of civil personal injury trials found that jurors tended to scrutinise the personal behaviour of plaintiffs, with seemingly no limits:

² W R Morse, 'Desire and the Limits of Melodrama' in James Redmond (ed), *Melodrama* (1992) 17, 18.

³ Brooks, above n 1, 15.

Jurors criticized plaintiffs who did not act or appear as injured as they claimed, those who did not appear deserving, and those with preexisting or complicated medical conditions. The state of their marriages, their treatment of their children and coworkers, and their financial status were all subject to close examination. Jurors held plaintiffs to high standards of comportment.⁴

Therefore, the plaintiff must not be found to be morally deficient or else her or his loss may be seen as 'just desserts'. However, what is valued about the pre-injury state, the characteristics of virtue, the manner in which virtue is threatened and suffering, vary for different types of plaintiffs.

In the classical melodramatic theatre of Pixérécourt's day, the protagonist role was nearly always played by a young female, and her virtue and social roles were fairly traditionally defined. However, in the legal injury narrative the plaintiff role may be filled by individuals who vary greatly in terms of age, gender and ethnicity. Adult plaintiffs are required to demonstrate the 'virtues' of their pre-injury state in order to identify what they have lost as a result of their injury. Where the plaintiff is a child, the focus is on the child's potential as an adult, rather than his or her state at the time of the injury.

These different expectations arise because men, women and immigrants come before the law already cast with stereotyped characteristics. For example, when a woman comes before the law, she is already cast as a typical female character such as mother, wife, sexual object, or pregnant woman. Immigrants are frequently also portrayed as one of two extreme types: those who have fully assimilated into Australian culture and who have over-achieved in business; and those who are criminals, drug-users and welfare cheats.⁵ Although challenges have been made to the dominant legal characterisation of women and immigrants⁶, these characteristics are imposed subtly and can be difficult to

⁴ V P Hans, *Business on Trial: The Civil Jury and Corporate Responsibility* (2000) 28-29.

⁵ See similar comments about Afro-American women in J O Brown, L A Williams and P T Baumann, 'The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor' (1996) 6 *UCLA Women's Law Journal* 457, 463.

⁶ For example, Professor Susan Wendell's work on women's victimization: "Oppression and Victimization: Choice and Responsibility", in D Shogan (Ed.), *A Reader in Feminist Ethics* (1992) 277; Martha Mahoney's work: "Legal Images of Battered Women: Redefining the Issue of Separation", (1991) 90 *Michigan Law Review*; and Kathy Laster's work on immigrants and

address directly.⁷ The difficulty is exacerbated by the fact that cultural classifications such as gender and ethnicity are only aspects of a dynamic, multi-dimensional subject.⁸

7.3 Attributes of Virtue

In the melodramatic form, the legal injury narrative explains a person's actions by reference to their character. When their character's role is based on a gender stereotype, the explanations are necessarily affected. Whether or not a female plaintiff fits the stereotypical assumptions of her gender may affect whether or not she is seen as virtuous and thus deserving of recognition and reward for suffering. It may also affect the amount of compensation that a plaintiff is awarded, due to consequential assumptions about the nature and extent of a particular plaintiff's loss.

Male and female characters are generally expected to behave in typically masculine and feminine ways, respectively. It is not controversial to say that the notion of acceptable behaviour for women has developed a great deal since Pixérécourt's time, but although expectations about both masculinity and femininity are subject to changing social structures, examination of personal injury cases reveals a fairly traditional view of men and women's value in society. The following sections consider the stereotyped attributes of virtue (the valued characteristics) for male, female and immigrant characters who might be cast in the plaintiff role. These stereotypes affect assessments of those characters' deservedness, and also how harm and suffering is defined for those characters.

7.3.1 Male Virtue and Social Roles

In melodramatic theatre male characters have stereotypically masculine virtues and social roles. They are generally employed in some kind of public work. For example, in *Coelina* Dufour manages a large estate and employs staff, Andrevon is a doctor, and Michaud is a miller. Melodrama's men are also very active characters, frequently engaged in lengthy and arduous travel (for example, Aubri

personal injury: K Laster, 'Migrants and the Duty to Mitigate Damages for Personal Injury' (1982) 7 *Legal Service Bulletin* 249.

⁷ R Graycar, 'Damaged Awards: The Vicissitudes of Life as a Woman' (1995) 3 *Torts Law Journal* 160, 160.

⁸ N Naffine and R J Owens (eds), *Sexing the Subject of Law* (1997) 15.

in *Le chien de Montargis* and Jafar in *Les ruines de Babylon*). The main male characters in Pixérécourt's melodramas are often in the army or some powerful political hierarchy (see for example *Le chien de Montargis*, *L'homme à trois visages*, and *Les ruines de Babylon*).

Male characters are typified by their virility and often compete as rival lovers for the heroine's affections. The villain is the seducer of young maidens and the heroes are future husbands and providers. It is accepted that men have conjugal rights as a husband, and to deny them is 'beyond human strength' (as Jafar's failure to keep his promise not to consummate his marriage to Zaida was explained in *Les ruines de Babylon*). In melodrama, where the protagonist is male, he suffers because he is impotent and his masculinity is impaired.⁹

With respect to children, men are concerned primarily about their rights and obligations over them. In *Coelina*, the good Francisque explained that he ensured that Coelina's birth certificate registered him as the father, as he wished 'to retain rights over [his] daughter'. Men only take responsibility for the care of children where the mother is not present, either due to death or some form of unavailability (for example, *Les ruines de Babylon* Jafar must take care of his son as Zaida is unable to reveal her son's existence). However, this responsibility ends when the mother returns to her rightful position in the family, or when another woman can be employed to conduct these duties (for example, Tiennette in *Coelina*).

In the legal injury narrative men are portrayed in a very similar manner. They work in the public sphere, are typified by their virility, and are rarely the primary care givers for their children. As Regina Graycar points out:

Men just 'do' certain things: they play football, they play golf, they go to work (of course, this latter phenomenon needs no explanation, unlike in cases involving women), they like cars and boats, they play with their children and they have sex, which they enjoy.¹⁰

⁹ G Nowell-Smith, "Minnelli and Melodrama", in C Gledhill (Ed.) *Home is Where the Heart Is* (1987) 72, quoted in L Jacobs, 'The Women's Picture and the Poetics of Melodrama' (1993) 31 *Camera Obscura* 121, 121.

¹⁰ R Graycar, 'Sex, Golf and Stereotypes: Measuring, Valuing and Imagining the Body in Court' (2002) 10 *Torts Law Journal* 205, 206.

In the legal injury narrative men's primary role is working in the public sphere. When a male plaintiff is not able to work due to injury, compensation is calculated to cover lost income, taking into account factors such as the chance of future promotion, career changes, and potential productivity increases. However, when a man loses his job or is unable to work, his loss is not seen just as financial. Work for a man is seen as a source of friendship and an activity that gives meaning and fulfilment to life.¹¹ Men are often portrayed as suffering because they cannot fulfil their expected role as provider to their families:

[He] feels humiliated that he is not the breadwinner.¹²

Mr O'Brien was a strong, physically active and healthy man who has reacted very badly to a disabling injury. The job that he held was well suited to a strong healthy man and gave him good pay and good prospects but since the accident he has not been able to do the things that he thinks appropriate for a man of his age and size. He feels very humiliated. He has been suicidal because of his feelings of worthlessness.¹³

Male bodies are also generally valued for their strength and virility:

he was clearly proud of his physical prowess prior to his injury¹⁴

...in the years leading up to the accident he would play tennis or squash weekly, as well as playing social cricket or golf¹⁵

Men are expected to be active, both in work as well as in play.

The plaintiff's case is that, while he was a very fit man up until the accident...¹⁶

Prior to the accident the plaintiff says that he was very fit, running daily and maintaining an interest in martial arts training.¹⁷

¹¹ Brown, Williams and Baumann, above n 5, 493.

¹² *O'Brien v McMullen* [1999] QLDSC 2478.

¹³ *O'Brien v McMullen* [1999] QLDSC 2478.

¹⁴ *Maynard v Rover Mowers Ltd* [1999] QLDSC 4509 of 1996.

¹⁵ *Gregory Hackett v Enid Rochow* [2000] ACTSC 96.

¹⁶ *Koznjak v Andreco-Hurll Refractory Services Pty Ltd & Anor* [2000] ACTSC 10.

¹⁷ *Simonfi v Fimmel* [2000] ACTSC 54.

[The plaintiff] was apparently quite fit before the first accident, and had played schoolboy sports to a representative level, although not for some years prior to the accident.¹⁸

The plaintiff was an enthusiastic participant at sports at school...¹⁹

Prior to the accident the plaintiff enjoyed playing tennis and coaching school children after school in soccer and basketball and netball...²⁰

Men in the legal injury narrative are also characterised by their virility and sexual prowess. Graycar's analysis of Australian personal injury cases revealed that 'discussions around damage to men's reproductive systems/organs often led to comments about loss of sexual ability or enjoyment'.²¹ Where the male plaintiff's relationship with his wife is affected by his injury, it is generally the sexual nature of that relationship that is mentioned:

His relationship with his wife was affected for a time through a loss of libido...²²

He was irritable, and for a time his sexual relations with his wife were affected.²³

His change in personality has adversely affected their married life including his sexual relationship with his wife.²⁴

...very substantially diminished his enjoyment of life and indeed the sexual dysfunction which resulted from it had a significant deleterious impact on the domestic relationship between the appellant and his wife.²⁵

He was experiencing marriage difficulties with his wife, a drop of libido and insomnia.²⁶

The injured plaintiff is thus the antithesis of hegemonic masculinity which is constituted through bodily performance.²⁷ Robert Murphy explains:

¹⁸ *Angelo Cerullo v Adam Gilrain & Ouy Tang Jong* [2000] ACTSC 64.

¹⁹ *Joanne Maree Mitchell v Mathew Barham* [2000] ACTSC 88.

²⁰ *Wilke v Astra Pharmaceuticals Pty Ltd & Anor* [1999] NSWSC 1047.

²¹ Graycar, above n 40, 16.

²² *Future Look Landscaping Pty Ltd v Hanlon* [1998] NSWCA BC9805239, CA 40658/97.

²³ *Allen v NSW Fire Brigade* [2000] NSWSC 276.

²⁴ *Wade v Australian Railway Historical Society (South Australian Division) Trading as Streamranger and Alexandrina Council* [1999] SASC 311.

²⁵ *Lee v Quality Bakers Australia Ltd* [2000] QCA 285.

²⁶ *Finn v Queensland Ambulance Service* [2000] QSC 472.

For the male, the weakening and atrophy of the body threaten all the cultural values of masculinity: strength, activeness, speed, virility, stamina, and fortitude.²⁸

Children are not assumed to be a priority for men in the legal injury narrative. In *Conyard v Hancock Bros Pty Ltd*, when the issue of the male plaintiff's loss of the ability to have children was raised, it was in the context of his wife's, rather than his own, hopes and desires:

[The plaintiff's wife] is still a young woman whose life has been devastated by her husband's condition...Her hope for children has been rendered most unlikely to be realised because of the cost, since they had planned to participate in an IVF program, and the Plaintiff's dependence.²⁹

The male's loss with respect to existing children is the reduction in his ability to play with, rather than care for, them.

Both the plaintiff and his wife gave evidence that this need for caution in playing with his children is distressing.³⁰

He must also be careful in playing with his children.³¹

As these examples reveal, male virtue in the legal injury narrative is not so very different from the characterisation of male virtue in classical melodrama.

7.3.2 Female Virtue and Social Roles

The melodramatic heroine is always young and beautiful. In *Les mines de Pologne* the heroine is described as 'beautiful Floreska, ornament of Poland'. In *Rosa* the villain describes the heroine as 'as virtuous as she is beautiful'. Coelina is 'charming' and 'lovely'. In *Les ruines de Babylone* Zaidar is described as an 'incomparable treasure of light and beauty'. Apart from physical beauty, the

²⁷ T J Gerschick and A S Miller, 'Coming to Terms: Masculinity and Physical Disability', in Kimmel, Michael S. and Messner, Michael (Eds.) *Men's Lives* (4th Ed., 1998).

²⁸ R Murphy, *The Body Silent* (1990) 94.

²⁹ [1995] QLDSC 1713.

³⁰ *Robert Vanderhoeven v Cheryl Shelley* [1998] SCACT 53.

³¹ *Blazeski v City Group Cleaning Contractors* [1999] ACTSC 69.

heroine is also benevolent, dutiful, obedient, self-sacrificing and loving.³² She is 'the ultimate maternal nurturer and virtuous role model, neutered and asexual'.³³

The heroine's relationships reveal an ideal world of filial and conjugal affection.³⁴ Gabrielle Hyslop observes that the role of the heroine in Pixérécourt's melodramas is primarily domestic and she interacts with others as a mother, wife or daughter.³⁵ Where female characters are employed, they are usually from the lower classes and working as a housekeeper or nanny in return for lodging and protection from the master of the household.³⁶ The heroine's ideal state of virtue is demonstrating her devotion and loyalty to her family. The 'happiness of her family is her sole preoccupation'.³⁷ Pixérécourt often opens his plays with 'picturesque scenes of family happiness'.³⁸ Hyslop cites as a classic example the opening scenes of *Rosa*:

...an adoring husband and child prepare a spectacle to celebrate the wife/mother heroine. Garlands decorate the garden in front of their cottage and Rosa's name is written in roses above the door. She makes her entrance beneath an arch of flowers and her son strews flowers before her as he leads her to the central position on stage where bouquets of flowers are placed at her feet.³⁹

In the legal injury narrative the 'ideal' woman is portrayed in much the same way, despite the apparent changes in the role of women in society since Pixérécourt's day. Women are generally characterised as being, or at least desiring to be, beautiful, wives and mothers. If they work in paid employment, this is still seen as temporary or a substitute for their preferred mothering role. They tend not to engage in leisure activities or sex for pleasure. As Graycar explains:

³² F Rahill, *The World of Melodrama* (1967) 66.

³³ Brown, Williams and Baumann, above n 5, 461. As opposed to the "whore" who is evil, aggressive, uncaring, impure, strong, disobedient, and sexual: P Easta, *Less Than Equal: Women and the Australian Legal System* (2001) 21.

³⁴ Rahill, above n 32, 64.

³⁵ G Hyslop, 'Deviant and Dangerous Behaviour: Women in Melodrama' (1985) 19 *Journal of Popular Culture* 65, 67.

³⁶ Such as Tiennette in *Coelina*.

³⁷ The villain describing Rosa.

³⁸ Hyslop, above n 35, 67.

³⁹ Ibid.

It's harder to find explicit references to women's leisure activities in the cases, though it is more common in cases involving younger women and girls to hear about sport. Women, on the other hand, have babies (although rarely do they play with them, unless they're grandmothers: they care for them instead). It's easier to find references to women getting pleasure and satisfaction from housework than it is to find references to sexual pleasure.⁴⁰

It may well be that these stereotypical women have little time or energy for anything at all after their domestic chores are done. However, the 'normal' woman does not appear to mind, as for her family responsibilities are the first and foremost priority and source of fulfilment.

Women often have to conform to the madonna stereotype in order to be eligible for the law's protection.⁴¹ Judges and juries have a 'soft spot' for the madonna character, and if a woman challenges conventions she is at a significant disadvantage.⁴² Women who fit the madonna stereotype in the legal injury narrative are more likely to have their evidence accepted. For example, in *Conyard v Hancock Bros Pty Ltd* the judge commented that the male plaintiff's wife 'presented as a devoted, supportive and loyal wife and I accepted her evidence without reservation'.⁴³

Other examples can be found where the female plaintiff's goodness is judged on the appropriateness of her behaviour with reference to stereotypical gender assumptions. The case of *The Australian Capital Territory v Cindy Van der Gevel and the Nominal Defendant*⁴⁴ is a good example. The judges placed considerable emphasis on why the female plaintiff was in this particular setting at the time she was injured. The judges explained that her partner had been apprehended for drink driving and she was walking to collect his car from where it had been left on the side of the road. This information was really not relevant to liability; however it was mentioned a number of times. It appears that an explanation for the plaintiff's presence in this particular setting was required

⁴⁰ Graycar, above n 10, 206.

⁴¹ Brown, Williams and Baumann, above n 5, 504.

⁴² Eastel, above n 33, 31.

⁴³ *The Australian Capital Territory v Cindy Van der Gevel and the Nominal Defendant* [1998] ACTSC 118.

⁴⁴ [1998] ACTSC 118.

because its absence in the narrative would reflect badly on the plaintiff. In other words, nice girls don't walk on lonely stretches of road at night.⁴⁵

In the legal injury narrative, women's roles are still portrayed as primarily domestic. In contrast with the male plaintiff's frustration at his inability to be the 'breadwinner', the female plaintiff is frustrated with 'the pain and inability to do the things expected of a wife'.⁴⁶ For example, *Southern Regional Health Board v Grimsey (An Infant) by her next friend Grimsey* when the trial judge summarised the basis of the female plaintiff's claim for damages for pain, suffering and loss of amenities the focus was on her loss of the possibility of marriage and children. There is no mention of her loss of opportunity to engage in work in the public sphere, to play sport, or other stereotypically male pursuits.

Her loss of life's amenities is almost total. She is devoid of the ability to perform any human function without assistance. She is impeded in all forms of communication. Her body writhes about almost incessantly unless she is asleep. She will never marry. She is incapable of meaningful sexual fulfilment. She will never have a husband to comfort and support her. She will never have children. She is virtually imprisoned in a world of her own. She has the faculties of vision and hearing but to what degree is not clear. Never have I known a more gravely disabled plaintiff.⁴⁷

The role of women in domestic life (as opposed to public working life) and their dependence on men is reinforced by the fact that their work in the home is not valued by the market.⁴⁸ A woman's loss of the capacity to work in the home is seen as a loss of amenity, rather than an economic loss.⁴⁹ Any incapacity is often seen as a loss not to herself, but to her husband and family.⁵⁰

⁴⁵ Had the plaintiff not had a reasonable explanation for her presence on that particular road so late at night, it seems possible that a finding might have been made that the incident was her own fault (much like the rapist's defence that "she was asking for it").

⁴⁶ *Hanzic v Cabramatta Community Centre Inc & Ors* [1999] NSWSC 1205.

⁴⁷ BC9805996, Supreme Court of Tasmania, Full Court Appellate, FCA 89/1997; 139/1998.

⁴⁸ L M Finley, 'Female Trouble: The Implications of Tort Reform for Women' (1997) 64 *Tennessee Law Review* 847, 861; R Graycar and J Morgan, *The Hidden Gender of Law* (2nd ed, 2002) 88.

⁴⁹ Graycar, above n 7, 161.

⁵⁰ Graycar and Morgan, above n 48, 129. This may well be a leftover from the former state of the law allowing actions by the husband for the loss of his wife's services when she was negligently injured by another.

The assumption that women are economically dependent on men is rarely explicitly stated, but is revealed by reading between the lines of judicial statements such as this:

If by reason of her injuries the appellant does not marry, then the economic significance of her seriously diminished capacity to work in a gainful occupation, on which she would have to depend, will be considerable....⁵¹

This stereotyping has effects far broader than those in particular personal injury cases. It also forms the basis of a more widespread discrimination in other areas of the law:

[The] patriarchal division valuing the market over the family, thereby [ensures] male dominance even in the primary female sphere of the family. In turn, the workplace structure presumes and requires a worker with a nonprimary care giver family role, imposing on women the sometimes impossible burden of accommodating work and family responsibilities. Universalized narratives of women in the family 'form underneath' and act as a foundation for legal doctrines and rules pertaining to family law, employment, property, commerce, education, and welfare, while defining and reinforcing social functions and experiences.⁵²

In relationships where both partners work in the public sphere, there has been some recognition of the need for both male and female partners to share domestic duties, and judges now often assume that the modern marriage is based on a relationship of reciprocity. Men often benefit from this assumption by receiving compensation for an inability to perform half the household domestic duties. However, for women this can be a double-edged sword as the reality is often that women still assume a greater burden of work in the home.⁵³

⁵¹ *State of NSW v Moss* [2000] NSWCA 133.

⁵² C P Gilkerson, 'Theoretics of Practice: The Integration of Progressive Thought and Action: Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories' (1992) 43 *Hastings Law Journal* 861, 878.

⁵³ R Graycar, 'Love's Labour's Cost: The High Court Decision in *Van Gervan V Fenton*' (1993) 1 *Torts Law Journal* 122, 136.

Even when women have careers in the public workforce and no children, they are still frequently treated as if they intend in the future to fulfil the domestic role expected of them. Even if unmarried at the time of injury, the single female plaintiff is generally presented as hoping to marry and start a family and this possibility is used to reduce the award of damages. Although there have been major developments in contraception and many women choose not to have children, the law still tends to assume that all women will eventually reproduce. Accordingly, a woman's loss is usually calculated by reference to gender-biased assumptions about the effect of marriage and childbearing on women's work force participation, advancement, and earnings.⁵⁴ Australian courts routinely reduce female plaintiffs' damages by assuming that women lack attachment to the paid labour market because of their child bearing capacity and their assumed inability to have successful careers and children.⁵⁵

This stereotyping of women, even in the face of their apparent lack of stereotypical characteristics, is common in melodramatic narratives. In Barbara Cooper's article about Pixérécourt's *Charles Le Téméraire*⁵⁶, she examines the heroine Léontine. At first glance, Léontine does not appear to fit the stereotype of the passive heroine. She is portrayed as a fighter and a patriot, defender of the beleaguered city of Nancy. However, a careful analysis of her character reveals that she is not so different to most women represented in early nineteenth-century French melodramas, whose 'strength of character and conviction is not matched by the kinds of physical or socioeconomic powers that would enable them to combat evil on their own'.⁵⁷ Regardless of Léontine's apparent masculine power, she is still inherently characterised by a stereotypically feminine role. She is first presented as a 'good mother' and is described throughout the play (by others and Léontine herself) as 'bonne maman', 'pauvre mère' and 'ma fille'.⁵⁸ In effect, the play highlights the continuing tension between her role as a good mother and that of an active and devoted patriot.⁵⁹ Léontine is always described via her relationship to men and is always subservient to and/or dependent on

⁵⁴ Finley, above n 48, 861.

⁵⁵ Graycar, above n 7, 164.

⁵⁶ B T Cooper, 'Up in Arms: Defending the Patriarchy in Pixérécourt's *Charles Le Téméraire*' (1993) 47 *Symposium* 171.

⁵⁷ Ibid 171.

⁵⁸ Ibid 174.

⁵⁹ Ibid 175.

them. Even when she appears to be leading men, she is not in fact dictating their actions. Finally, her leadership and mobility is only possible when she is wearing a uniform that disguises her gender.⁶⁰ The heroine only has the same freedom of movement as a man when she travels under a false identity (as a man) and she never travels far without returning to her home and family.⁶¹ As Cooper concludes, Pixérécourt's melodrama reinforces the fact that 'female heroism will be rewarded only if it is exercised in service to the patriarchy and only if it does not induce a woman to forget her proper place once her mission has been completed'.⁶²

The modern equivalent of Léontine in the legal injury narrative is the career woman. Despite the large number of women in paid employment, women's work in the public sphere is still not seen as a source of meaning and fulfilment in women's lives. Instead, it is often seen as little more than a poor substitute for marriage and motherhood. Graycar notes that in cases involving female plaintiffs there is almost always an explanation provided for why the woman works, coupled with an underlying assumption that should the particular reason disappear she would no longer engage in paid work.⁶³ Hoff's description of the widespread response to women who work is indicative: 'If unmarried, their career is designated a 'substitute' for marriage; if married, their career is designated a 'substitute' for motherhood; if a mother, their career brands them as selfish and neglectful.'⁶⁴ This is consistent with West's assertion that the dominant culture condemns the woman who wants to exist apart from others.⁶⁵

The legal injury narrative also treats the female body differently from the male body. Unlike the focus on the male body's strength and virility, women's bodies are valued according to socially constructed expectations about beauty. Just as in classical melodrama the heroine is always young and beautiful, in the legal injury narrative, the female plaintiff's appearance is often referred to and admired:

A well-presented young looking woman.⁶⁶

⁶⁰ Ibid 172.

⁶¹ Ibid 178.

⁶² Ibid 184.

⁶³ Ibid 165.

⁶⁴ J Byars, *All That Hollywood Allows: Re-Reading Gender in 1950s Melodrama* (1991) 86.

⁶⁵ R West, 'Jurisprudence and Gender' (1988) 55 *University of Chicago Law Review* 1, 38.

⁶⁶ *Risteska v The Commonwealth of Australia* [1999] ACTSC 56.

At the time of the accident the respondent was an attractive young woman, aged 14.⁶⁷

The female plaintiff is also seen to suffer more harm than a man when she suffers an injury that impacts upon her physical attractiveness. For example, in *Pozgay v E J O'Connor & Sons Pty Ltd*⁶⁸ the plaintiff was a 26 year old female who suffered injuries resulting in scarring to her face and a 'lopsided smile'. Evidence was led that she had some concerns about her body image and weight gain before the accident. The judge commented that 'the plaintiff tendered a photograph of her pre-injury smile, and it is undoubtedly more perfect and symmetrical than at present. She does have a facial scar visible at conversational distance, and her smile is, due to the permanent nerve damage, no longer perfect and is asymmetrical.' The judge did note that 'the longstanding approach that cosmetic injuries to a young woman might be expected to have a greater impact than the same injuries to, say, a male of mature years' reflected longstanding sexual stereotypes that may longer be appropriate. However, the judge found that 'the plaintiff's cosmetic injuries have had a profound effect on her' and took that into account in assessing general damages. The judge also noted that, 'counsel for the defendant pointed out, quite fairly in my view, that the plaintiff remains an attractive young woman with only a faint visible scar and a slightly imperfect smile'.

This focus on physical attractiveness extends to sexual attractiveness, but continues to treat women as passive objects of the male gaze, rather than active sexual beings. Where a woman suffers from an injury that impacts upon her sexual abilities, the focus is inevitably on her ability to reproduce, rather than to take pleasure in the sexual act. Prior, discussing the North American Guides to the Evaluation of permanent impairment, notes that in the chapter on the reproductive system:

[A]n impairment of the penis results in 5-10% whole-person impairment when 'sexual function is possible, but there are varying degrees of difficulty of erection, ejaculation, and/or sensation'...By contrast, the criteria for evaluating impairment of the vulva-vagina make it clear that a

⁶⁷ *Angela Pozgay v E J O'Connor & Sons and Brian O'Connor* [2000] ACTSC 59.

⁶⁸ [2000] ACTSC 59.

0% whole person impairment rating can result if ‘symptoms...do not require continuous treatment’, ‘the vagina is adequate for childbirth during premenopausal years’, and ‘sexual intercourse is possible’.⁶⁹

In fact, it has been suggested that the law’s ostensible concern with the health of women is often really a concern with their reproductive role.⁷⁰

This characterisation of female virtue, and its application to all women cast in the plaintiff role, has implications for female plaintiffs (especially those who do not fit the stereotype) and also broader ramifications in the perpetuation of gender stereotypes and hierarchies in society.

7.3.3 Immigrant Virtue and Social Roles

The plaintiff’s role in the legal injury narrative tends to be ethnically identified. This is not surprising given that the legal injury narrative has traditionally been developed by white anglo-saxon males. To a certain extent, the legal injury narrative is a product of that particular culture and expresses that communities’ values.⁷¹ As such, the legal injury narrative tends not to ‘fit’ those from other cultures, and the stereotypical roles it incorporates do not necessarily make sense to some of those people who seek recognition in accordance with it.

Before the 1970’s, immigration policy was based on a notion of assimilation, which assumed that immigrants could be culturally and socially absorbed and rapidly become indistinguishable from the Anglo-Australian population.⁷² This approach began to change in the early 1970’s during the Whitlam Labor Government. In 1982 the Australian Council on Population and Ethnic Affairs printed a brochure entitled ‘Multiculturalism for all Australians’ which stated:

Multiculturalism is...much more than the provision of special services to minority ethnic groups. It is a way of looking at Australian society, and involves living together with an awareness of cultural diversity. We

⁶⁹ E S Prior. “Flawed Promises: A Critical Examination of the American Medical Association’s Guides to the Evaluation of Permanent Impairment”, (1990) 103 *Harvard Law Review* 964 at 970.

⁷⁰ See for example Brown, Williams and Baumann, above n 5, 474.

⁷¹ SA Ifill, ‘Racial Diversity on the Bench: Beyond Role Models and Public Confidence’ (2000) 57 *Washington and Lee Law Review* 405, 439.

⁷² J Stratton and Ien Ang, ‘Multicultural Imagined Communities: Cultural Difference and National Identity in the USA and Australia’ in D Bennett (ed), *Multicultural States: Rethinking Difference and Identity* (1998) 151.

accept our differences and appreciate a variety of lifestyles rather than expect everyone to fit into a standardised pattern. Most of all, multiculturalism requires us to recognise that we each can be 'a real Australian' without necessarily being 'a typical Australian'.⁷³

However, it appears that the legal injury narrative may not adequately reflect this notion of diversity. Melodrama typically focuses on restoring the moral, social and domestic order.⁷⁴ Accordingly, change, development and growth are not valued. Melodrama allows certain aspects of Australian culture and society to be portrayed as the norm and the associated values as representative of innocence and virtue.⁷⁵ Protagonists are judged according to how well they meet that model. As such, for an immigrant to be virtuous, he or she must demonstrate his or her willingness to work towards ridding him or herself of the qualities of otherness and adopting the dominant culture's characteristics of virtue.

In order to fit the 'good injured plaintiff' role, the immigrant must first fit the role of the 'good immigrant'. The normative characteristics of the good immigrant are particularly noticeable in the selection of personal injury unreported judgments, where a large proportion of the cases involve a plaintiff who is an immigrant, generally from an Eastern European country.⁷⁶ A 'good' immigrant is characterised as one who 'through sheer effort' has established an affluent lifestyle, and takes pleasure and pride in this considerable achievement'.⁷⁷ The 'good' immigrant shows evidence of having been 'a hard worker all of his life',⁷⁸ speaking reasonable English, and having assimilated well into the Australian culture.

⁷³ Ibid 154.

⁷⁴ J D Mason, *Melodrama and the Myth of America* (1993) 18-19.

⁷⁵ L Williams, *Playing the Race Card: Melodramas of Black and White from Uncle Tom to O.J. Simpson* (2001) 17.

⁷⁶ See for example: *Robert Vanderhoeven v Cheryl Shelley* [1998] SCACT 53, *Risteska v The Commonwealth of Australia* [1999] ACTSC 56, *Zorzi v Robbins* [1999] ACTSC 72, *Blazeski v City Group Cleaning Contractors* [1999] ACTSC 69, *Ivan Bagic v Commonwealth of Australia* [1999] ACTSC 134, *Artur Fatur v IC Formwork Services Pty Ltd and Civil and Civic Pty Ltd* [2000] ACTSC 14, *Stankovic v Banfield* [2000] ACTSC 8, *Koznjak v Andreco-Hurll Refractory Services Pty Ltd & Anor* [2000] ACTSC 10, *Faten Almazaydeh v Jason Chan* [2000] ACTSC 98, *Kalavrouziotis v Howel and Anor*, BC9802349, Supreme Court of Western Australia, Full Court, 196 of 1996.

⁷⁷ *Robert Vanderhoeven v Cheryl Shelley* [1998] SCACT 53.

⁷⁸ *Koznjak v Andreco-Hurll Refractory Services Pty Ltd & Anor* [2000] ACTSC 10.

In contrast, the ‘bad’ immigrant is one who exaggerates his or her symptoms, takes time off work on a regular basis, is not really motivated to continue to work, and considers an award of damages in a personal injury action as a convenient means by which to secure his or her financial future. For example, in *Kalavrouziotis v Howell and Anor*⁷⁹ the judge suggested that ‘because of educational and cultural reasons, and perhaps because of language difficulties’ the plaintiff had not benefited from psychiatric treatment. He had also refused to follow advice and ‘set his mind against rehabilitating himself in circumstances in which he knew that choice was available to him’.⁸⁰ In *Artur Fatur v IC Formwork Services Pty Ltd and Civil and Civic Pty Ltd*⁸¹ the plaintiff was described as an unimpressive witness. The judge stated: ‘Unfortunately, with the plaintiff’s background, his lack of English and his relatively strong financial position, it is unlikely that he will ever be convinced that he is fit to resume work and it is impossible to disentangle other causes for his continuing incapacity from the consequences of the injury’.⁸² In *Ivan Bagic v Commonwealth of Australia*⁸³ the judge suggested that while the plaintiff continued to receive Commonwealth Comcare benefits, it was unlikely that he would be motivated to seek work and ‘that he will continue to see himself as more incapacitated than he is’.⁸⁴

Accordingly, the legal injury narrative incorporates a particularly white Anglo-Saxon ideal of virtue, and applies it to all plaintiffs, whether or not they fit that cultural background. A close analysis of the personal injury cases reveals that, although the language of the White Australia policy has disappeared, the ideal of assimilation is remarkably resilient.

7.4 Virtue and Suffering

Along with the recognition of virtue, another central theme of melodrama is suffering. These two themes are inherently linked, in that it is as a consequence of the heroine’s virtue being threatened that the heroine suffers. This suffering induces in the father figure a feeling of pathos, thus motivating him to act to alleviate the heroine’s suffering.

⁷⁹ BC9802349, Supreme Court of Western Australia, Full Court, 196 of 1996.

⁸⁰ At paragraphs 7 and 8.

⁸¹ [2000] ACTSC 14.

⁸² Ibid paragraph 33.

⁸³ [1999] ACTSC 134.

⁸⁴ Ibid paragraph 26.

Virtue defines the kinds of harm that lead to suffering. In other words, the characteristics of virtue define how a virtuous character may be harmed. Harm impairs a characteristic of virtue, and as a result, the enjoyment of the benefits of that virtue. For example, the classic example of harm to virtue is the rape of a female virgin. This act removes a characteristic of the girl's virtue (her virginity) and also her enjoyment of the benefits of that virtue (the ability to find a good husband). In melodramatic narratives, problems arise when the injured character cannot demonstrate pre-existing virtue (e.g. virginity), and when the character does not (at least appear to) suffer as a result of losing the benefits of that virtue (e.g. little interest in finding a husband anyway). Accordingly, the characteristics of the original valued state are important in determining the extent of suffering as a result of the harm. Using the above example, it may be argued that a female who has already lost her virginity (and thus her chance to find a good husband) and who is raped may be said to have suffered less than a virgin who has been raped.

The primary characteristic valued in the legal injury narrative is physical wholeness, and the main harm is physical injury. Although this might seem relatively uncontroversial, Smith suggests that where a person is valued according to his or her physical abilities, this becomes problematic when that person suffers a physical disability:

The disciplinary practices of physical normality are internalised and socially pervasive. They require members to meet physical standards and to objectify their bodies and control them. Proximity to social standards is then ingrained in the sense of personal identity, social acceptance and self respect.⁸⁵

Measuring damage or impairment also 'requires normative and not uncontroversial judgments about the activities or abilities that should matter for the purposes of the measurement'.⁸⁶ For example, a woman is generally not expected to be as physically strong and active as a man. Accordingly, she may be seen to have suffered less harm than a man as a result of physical impairment.

⁸⁵ A Smith, 'Persons with Disabilities as a Social and Economic Underclass' (2002) 12 *Kansas Journal of Law and Public Policy* 13, 24.

⁸⁶ Prior, above n 69, 970.

In order to establish the value of the pre-injury state, the legal injury narrative begins with a portrayal of the plaintiff pre-suffering. Ideally the plaintiff is portrayed as having been physically well and emotionally happy, in addition to being able to fulfil his or her social roles. The plaintiff is held out to have lived a 'whole' life prior to the injury. The plaintiff's life is then transformed by the defendant's actions into one typified by extreme suffering. The starker the contrast between the pre-injury and the post-injury states, the more extreme the suffering. Thus, the injury itself tends to be described in terms which emphasize the severity of the plaintiff's pain, its continuing nature and the negative consequences, in contrast with the plaintiff's pre-injury health and fitness.

Many examples from the personal injury judgments are surprisingly reminiscent of Zaida's description of her suffering in *The ruins of Babylon*:

Yesterday, seated next to the throne, intoxicated by the incense that burned for Jafar, certain of his love and of the existence of my dear Nair, I was the happiest of wives and mothers. Today, reduced to the most wretched state, shamefully driven out of Baghdad, as the vilest of creatures...forever separated from a husband and a son who were massacred almost before my eyes...; without sanctuary, without support, without hope!

Some examples of similar contrasts in the description of the personal injury plaintiff's pre- and post- injury states follow, and there are more in Appendix 1.

[T]he plaintiff was as healthy and as strong as a young girl 22 years of age at the time of her injury (she was in fact 37), but she is now sick and getting worse every day, crying at night, keeping everybody awake. She only drives the car once every three months ... although she would try to do things, she was never able to.⁸⁷

I am satisfied that the fall in 1986 has had disastrous effects for the plaintiff, and converted what was an extremely active and productive life into one that has been fraught with pain and difficulties, and into one that

⁸⁷ *Risteska v The Commonwealth of Australia* [1999] ACTSC 56.

has required almost endless medical investigation, medication and treatment in one form or another.⁸⁸

Any factors which moderate the extremeness of the plaintiff's suffering must be downplayed. In many personal injury cases, any mention of improvements in the plaintiff's condition are brushed over or immediately followed with a negative aspect. This seems to be important in order to achieve consistency in the post-injury state. Some examples from personal injury cases follow, and there are more in Appendix 2.

There was slight improvement but she was still suffering severe pain.⁸⁹

The second operation achieved some improvement but it was not until some two years later that the plaintiff ceased to be affected by what he called 'pain in static circumstances'. However, use of the wrist even for relatively minor tasks continues to bring on pain which can last for as much as a couple of days.⁹⁰

The plaintiff sustained lacerations to her forehead and abrasions and bruising across her body in the accident, which have resolved, but continues to complain of neck and back pain, and has required extensive use of painkillers in the years since the accident.⁹¹

The diaries confirm that as well as these normal activities the plaintiff has from time to time engaged in some maintenance activities on two investment properties. The plaintiff acknowledged this, but said that he suffered pain in the process.⁹²

There are difficulties when the plaintiff is unable to demonstrate that she was physically 'whole' before the injury. This may result from evidence of a pre-existing condition or complaints of suffering prior to the incident giving rise to the claim. This can affect the assessment of damages. For example, a male plaintiff may have previously suffered a back injury that resulted in an inability to work. He later suffers a second injury as a result of the defendant's negligence

⁸⁸ *Hanzic v Cabramatta Community Centre Inc & Ors* [1999] NSWSC 1205.

⁸⁹ *Linda Ann Sheffield v Woolworths Ltd* [1999] ACTSC 46.

⁹⁰ *Hunter Garth Lonsdale v Ian Smith* [2000] ACTSC 15.

⁹¹ *Joanne Maree Mitchell v Mathew Barham* [2000] ACTSC 88.

⁹² *Gregory Hackett v Enid Rochow* [2000] ACTSC 96.

that further restricts his mobility. He would likely receive less compensation for pain and suffering than a fully fit plaintiff who only suffered the latter injury, as there is a much greater contrast between the pre- and post- injury states. Evidence that a plaintiff suffers from a pre-existing condition, such as schizophrenia, might also be used to argue that in the future this condition might affect the plaintiff's ability to work and accordingly damages for future loss of earnings should be discounted, even if that condition had always been appropriately managed.

It is not unusual for a defendant to lead substantial evidence to show that a plaintiff has complained of pain and suffering before the injury in question. In a sense, this is part of the defendant's role in the narrative – to question the plaintiff's virtue. Where the defendant is successful in persuading the judge on this issue, the plaintiff's claim is often dismissed or at least substantially discounted. For example, in one case a plaintiff who had been 'regularly complaining of headaches, dizziness, neck pain and low back pain since well before [the] accident' had his credit seriously called into question and his damages significantly discounted as a result.⁹³ In *Risteska v The Commonwealth of Australia* Miles CJ noted that:

Cross-examination established that the plaintiff had a history of taking days off from work on sick leave. The records of [her former employer] show 'headaches' on four occasions in the year before the injury. A statement from a fellow worker, who was not available for cross-examination, also stated that the plaintiff used to take time off for headaches before her injury. I conclude that she probably did have headaches on one or more of the occasions when she took sick leave and probably gave 'headaches' as a convenient but inaccurate reason on one or more occasions. This is consistent with her presentation as a witness.⁹⁴

Evidence of these sorts of complaints are often discovered in the plaintiff's treating general practitioner's notes.⁹⁵ Accordingly, in the legal injury narrative, a successful plaintiff will frequently lead evidence to support the fact that they

⁹³ *Zorzi v Robbins* [1999] ACTSC 72 at 328-330.

⁹⁴ [1999] ACTSC 56.

⁹⁵ See for example *Dibley v Bradman's Stores Pty Ltd* [2000] ACTSC 23 at 180-182.

have not complained of pain prior to the accident.⁹⁶ One of the main difficulties with evidence of pre-existing suffering is that it makes it difficult for the plaintiff to demonstrate extremes of suffering as a result of the injury.

7.4.1 Undeserved Harm

Historically, pain was sometimes seen as punishment for wrongdoing of some kind. In fact, as Scarry points out, the word 'pain' itself stems from 'poena' or 'punishment'.⁹⁷ This notion of pain as punishment forms the basis of the concept of undeserved suffering in melodrama, in the sense that a virtuous character should not be exposed to pain where they are not deserving of punishment. Accordingly, in order for the father figure to feel pathos, the harm suffered by the heroine must be seen as undeserved and therefore unjust. For example, the imprisonment of the virtuous heroine is unjust as she is seen as entitled to her freedom, and the father figure feels pathos and a desire to alleviate her suffering. In contrast, where the villain's wickedness is exposed and he is punished by a sentence of imprisonment, this is seen as a deserved harm as he is no longer entitled to his freedom as a result of his evil conduct.

Similarly, where an innocent plaintiff suffers injury as a result of the defendant's negligent conduct, the harm is seen as undeserved. But where the injury occurred because the plaintiff actively put him- or herself in danger, or where he or she is not a virtuous person, the harm may be seen as deserved, or the decision maker may not be predisposed to take any action to alleviate the plaintiff's suffering.

Where the plaintiff's harm has been inflicted by a clearly negligent defendant, the plaintiff should be entitled to compensation. Although a plaintiff's moral virtue should not, in theory, affect the plaintiff's entitlement, it appears that in practice, assessments of the plaintiff's virtue may affect the outcome of his or her claim for compensation. Valerie Hans's interviews with civil trial jurors found that jurors tend to focus on whether particular plaintiffs were 'deserving' of compensation, based on assessments of their character above and beyond its relevance for their credibility as witnesses.⁹⁸ O'Connell and Baldwin also

⁹⁶ See for example *Dass v Rifai & Anor* [1999] ACTSC 67 at 241-243.

⁹⁷ E Scarry, *The Body in Pain: The Making and Unmaking of the World* (1985) 16.

⁹⁸ V P Hans, *Business on Trial: The Civil Jury and Corporate Responsibility* (2000) 28-29.

mention two cases in which the plaintiffs' lack of virtue (based on drug use and sexual immorality) seems to have negatively impacted upon their cases:

In one medical malpractice case, the defense placed great emphasis on the fact that the plaintiff was drug-addicted. Ostensibly this was to indicate that her adverse medical result was due to her physical debilitation, but mostly it was to portray her as the 'villain' in contrast to the respectable, upright surgeon she was suing. Similarly, it was probably no coincidence that in the more conservative sexual mores of the 1960s, one of the first product liability cases against the castigated Corvair that General Motors (GM) allowed to go to trial involved a female plaintiff driver on a camping trip with her fiancée and her five children (GM won).⁹⁹

Previous sections of this chapter have discussed the kinds of attributes that are seen as virtuous in male, female and immigrant characters who may be cast in the plaintiff role. This section will now consider the kinds of attributes that are likely to result in a finding that the plaintiff is not virtuous, and therefore undeserving of compensation. The most common negatively valued attributes are criminality, sexual immorality (for women, not men) and a lack of desire to assimilate (for immigrants).

Potential plaintiffs with a criminal history may have some difficulty bringing a successful action for compensation for personal injury, or at least claiming a full entitlement to compensation for economic loss. The common law doctrine of attainder, by which those convicted of certain serious offences were removed of their civil rights to sue for compensation for personal injuries, has been limited by legislation in all Australian jurisdictions. (Although Section 95 of the *Public Trustee Act 1978* (Qld) still prevents a convicted person, serving a sentence of three years or more, from bringing an action to recover damages for personal injury). However, a plaintiff's criminal history still impacts upon his or her right to claim damages, and the amount of damages awarded.

For example, evidence that a plaintiff has a criminal record might be used to show that they were unlikely to have a good work record in the future and thus

⁹⁹ J O'Connell and J R Baldwin, '(in)Juries, (in)Justice, and (Il)Legal Blame: Tort Law as Melodrama - or Is It Farce?' (2002) 50 *University of California Law Review* 425, 449.

discount their damages for future economic loss. This occurred in *Williams v Workcover Authority of New South Wales*¹⁰⁰, in which Harper M stated:

[C]onsideration must be given to what the plaintiff's employment prospects might have been had it not been for the fall. His criminal history prior to the fall had included terms of imprisonment. At the time of the fall, there were charges pending against him which led to convictions thereafter. He has sought to blame his criminal conduct subsequent to the fall on his injuries and disabilities, but I have been unable to discern any change in the general pattern of his behaviour since the fall. There appeared to be some improvement in his conduct during the time of his employment with Cusacks and Sanfords, but it emerged that he was fraudulently receiving Centrelink benefits during that time, itself a criminal offence. I am not satisfied that by the time of the fall the plaintiff had achieved a point where his life of crime was behind him, or where his frequency of offending was likely to be much reduced.

Equally, I am not persuaded that the plaintiff's use of illegal drugs can be blamed on his injuries. He appears to have been mixing in a milieu in which others close to him were users of illegal drugs. Members of his family including his daughter were involved in criminal drug use. The plaintiff has not satisfied me on the balance of probabilities that his own drug use was injury-related or would not have happened if it had not been for the fall.

It must follow that the plaintiff's pattern of employment if it had not been for his injuries would probably have been irregular and interrupted by periods of imprisonment and drug rehabilitation.¹⁰¹

This persisting belief that plaintiffs will not change or improve their condition is characteristic of melodrama's insistence on renewing the status quo, rather than improving it.

Assessments of a lack of virtue based on sexual infidelity appears to be particular to female plaintiffs. For example, in *Beale v Government Insurance Office of*

¹⁰⁰ [2004] ACTSC 122.

¹⁰¹ Ibid, paras 99-101.

NSW¹⁰² the appellant appealed against the decision of the trial judge, who substantially discounted her damages based on an assessment of her credibility. The plaintiff's case was based on the fact that before the accident she had been a very active athlete, an active and ambitious teacher and a happily married woman, but that the accident had destroyed each of these aspects of contentment and satisfaction. She also claimed that the accident had ruined her marriage. The trial judge rejected her case on the basis of her credibility, stating that 'she has revealed an ability to practise deceptions on both her husband and her then boyfriend in some very fundamental respects'. On appeal, Mason P points out that:

The 'deceptions' on her husband is clearly a reference to the extra-marital affair with Mr Beale which was not revealed by the appellant to Mr Lewis until after the conception of Rachel. It is a little unclear what his Honour had in mind in referring to the appellant's deception of Mr Beale...In the upshot, the trial judge rejected 'out of hand' the claim by the appellant that the accident had destroyed her first marriage.¹⁰³

It seems that not only did the plaintiff's infidelity impinge upon her overall credibility, but it also limited the trial judge's assessment of the value of her claim that she had suffered harm to her marriage as a result of her injuries. In a sense the trial judge implied that she caused her marriage to disintegrate as a result of her immoral behaviour.

Immigrant plaintiffs can also find it difficult to fit the expectations of the virtuous plaintiff role. For example, immigrants who reject the erosion of their sense of cultural self are frequently portrayed as indulging in self-righteousness.¹⁰⁴ The self-righteous immigrant, holding on to their own ethnicity, is too representative of the 'other'. Otherness is incompatible with the dominant culture of virtue reinforced by melodrama. If the immigrant protagonist does not fit the virtuous role, he or she is likely to be cast as the villain. According to the stereotype, the 'bad' immigrant is one who has a poor

¹⁰² [1994] NSWCA 40628.

¹⁰³ Ibid 13-15.

¹⁰⁴ R B Heilman, *Tragedy and Melodrama: Versions of Experience* (1968) 114.

command of English and has not assimilated well.¹⁰⁵ They tend to have earned their livings in Australia as physical labourers, and accordingly when they lose their physical capacity, their level of English limits their opportunities for future employment. This can lead to the immigrant being blamed for his or her own suffering.

Immigrant plaintiffs also have to deal with the persistent stereotype of the immigrant who uses physical injury as an excuse not to have to continue to work. There have been claims that among those suspected of malingering there is a disproportionate number of immigrants.¹⁰⁶ The stereotype of the malingering immigrant is well represented by this extract from a medical report about a Yugoslavian personal injury plaintiff:

Personally I do not believe his statements and I believe that they are related to the inborn litigation skills which are so highly developed in his compatriots. I believe that there is little wrong with him that a fat compensation settlement would not alleviate.¹⁰⁷

However, the stereotype is not always so blatant. Immigrants are also frequently represented as being more prone to psychosomatic complications of injury such as compensation neurosis.¹⁰⁸ This is often explained on the basis that immigrants have certain characteristics that predispose them to these sorts of complications.¹⁰⁹ For example, immigrants frequently have a low social status in Australia and they are often performing work that they do not particularly want to do at the time of their injury.¹¹⁰

Medical practitioners often refer in their evidence to the 'typical scenario in migrants' in which they are injured and 'they don't get better, because there's something going on. They don't all just decide on one day to stop work and tell

¹⁰⁵ *Robert Vanderhoeven v Cheryl Shelley* [1998] SCACT 53, *Zorzi v Robbins* [1999] ACTSC 72, *Blazeski v City Group Cleaning Contractors* [1999] ACTSC 69, *Nguyen v Bucis* [1999] ACTSC 84, *Artur Fatur v IC Formwork Services Pty Ltd and Civil and Civic Pty Ltd* [2000] ACTSC 14.

¹⁰⁶ A Rubinstein, 'Mediterranean Back and Other Stereotypes: A Review of the Australian Literature Dealing with Industrial Back Injuries' (1982) 17 *Australian Journal of Social Issues* 295.

¹⁰⁷ Extract from N Parker, 'Malingering: A Dangerous Diagnosis' (1979) 1 *Medical Journal of Australia* 568, 568.

¹⁰⁸ Rubinstein, above n 106.

¹⁰⁹ H Miller, 'Accident Neurosis' [1961] *British Medical Journal* 919.

¹¹⁰ S Encel and C E Johnston, *Compensation and Rehabilitation: A Survey of Workers' Compensation Cases Involving Back Injuries and Lump Sum Settlements*. (1978) 48.

lies and sit reading the newspaper, there's something happening to them physically and mentally...'¹¹¹ There are repeated insinuations in the judgments that immigrant plaintiffs are prone to malingering, such as comments about how they continue to wear cervical collars despite advice from rehabilitation specialists that it is no longer necessary¹¹², and that they tend to develop pain disorders associated with psychological factors such as the difficulties they have had in their life since coming to Australia.¹¹³ There is an implication that these difficulties make immigrants more prone to develop pain disorders and malingere compared with those born in Australia. These explanations are all based on the premise that it is the immigrant's own characteristics that have caused or are contributing to the immigrant's suffering. For example, in *Bagic v Commonwealth*, the plaintiff was described as being an immigrant, who had had previous accidents, had previously taken sick leave, and had a history of difficulties with management and other staff.¹¹⁴ These factors impliedly reduced his credibility and suggested that, even if his complaints were genuine, he was the author of his own suffering.

7.4.2 Assumed Harms

Some characters who do not comply with the dominant stereotype may find that they are treated as if they do fit the stereotype. For example, a single mother who intended to leave her two young children in the care of relatives in order to spend a year working overseas may have difficulty claiming for the loss of that opportunity as a result of injury. At the very least, she is likely to have any amount awarded to compensate for that loss reduced to take into account stereotypical contingencies – for example that she would have been likely to come home early because she would miss her children.

Regina Graycar demonstrated the continuing discrimination against working women in her analysis of the 1994 case of *New South Wales Insurance Ministerial Corporation v Wynn*.¹¹⁵ She points out the irony in the fact that in this case the plaintiff had a classic 'male' work history, and yet she was still

¹¹¹ *Robert Vanderhoeven v Cheryl Shelley* [1998] SCACT 53.

¹¹² *Stankovic v Banfield* [2000] ACTSC 8.

¹¹³ *Faten Almazaydeh v Jason Chan* [2000] ACTSC 98.

¹¹⁴ *Ivan Bagic v Commonwealth of Australia* [1999] ACTSC 134.

¹¹⁵ (1994) Aust Torts Reports 81-304 (CA NSW).

treated by the Court of Appeal ‘as a woman’.¹¹⁶ The appeal on quantum revolved around the argument that the female plaintiff’s future economic loss damages should have been reduced to allow for the vicissitudes of life. In that particular case, the defendant argued that the vicissitudes of life must include consideration of the plaintiff’s marriage and the prospect of her having children. The Court of Appeal decided that any reduction must include ‘an allowance for the prospect that the plaintiff would be unwilling or unable to remain in her job which placed such heavy demands on her time, energy and health and the love and patience of her husband.’¹¹⁷ The court increased the deduction for vicissitudes from 5% to 28%, being 20% for the chance that she would have chosen or been forced to accept a less demanding job in the future, and 8% for having two children. During the special leave application, McHugh J asked the pertinent question: ‘Well, supposing the applicant had been a male, could you imagine a judge making a finding like this?’¹¹⁸ In this case the plaintiff was characterised much like Léontine. She was permitted to act as a male, but only as a temporary basis, and was still compensated as a stereotypical female.

7.4.3 Unrecognised Harms

Notions of virtue can also lead to certain harms being unrecognised by the legal injury narrative. If the injury prevents the plaintiff from enjoying something that, by societal norms, is undesirable or not valued, the legal injury narrative will not acknowledge this as a harm.

A consideration of those harms which are not recognised in the legal injury narrative reveals a great deal about the types of attributes and ways of life that are not valued by the dominant culture. This lack of value may be generalised (for example, applied to all women) or specific to the individual concerned. For example, West argues that women’s harms are often not identified or compensated as injuries by the legal culture:

¹¹⁶ Graycar, above n 7, 167. Note that on appeal the High Court reduced the allowance for vicissitudes to 12.5%, expressing that amount as the appropriate discount for maternity leave and the possible effects of the condition brought about by the 1972 accident, balanced against the prospect of further advancement. *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485 (High Court of Australia) at 499-500.

¹¹⁷ At 61,742.

¹¹⁸ Application for special leave, *Wynn v NSW Insurance Ministerial Corporation*, 18 April 1995, High Court, Mason CJ, Deane and McHugh JJ, at 2.

[P]hysically, women suffer harms of invasion not suffered by men; emotionally, women suffer greater harms of separation and isolation than do men; psychically, women suffer distinctive harms to their subjectivity, or sense and reality of selfhood that have no correlate in men's lives; and politically, women suffer distinctive harms of patriarchal subjection that again have no correlate in men's lives.¹¹⁹

These sorts of injuries are often dismissed as 'trivial, consensual, humorous, participatory, subconsciously wanted, self-induced, natural, biological, inevitable, sporadic, deserved, private, non-existent, incomprehensible or legally predetermined'.¹²⁰ However, they may also be considered as injuries that do not affect a state that is valued by society. For example, many women consider sexual harassment to be an injury as it has the effect of transforming them from a state in which they are treated with respect, into one in which they are treated as a sexual object. The law's failure to recognise this aspect of the harm has the effect of reinforcing the fact that a state in which women are treated with respect is not highly valued by society. It is also arguable that many of these injuries are not recognised on the basis that the woman does not fit the image of a passive victim, and is somehow seen as being actively involved in her own suffering. This has the effect of subtly suggesting that the valued state for women is a passive one, not an active engagement with society and men in particular.

The case of *Hornberg v Horrobin and Ors*¹²¹ provides a good example of how society's expectations of appropriate behaviour for women, and particularly mothers, can impact upon a woman plaintiff's claim for damages for physical injury. The plaintiff in that case became a tetraplegic as a result of her injuries; however the medical evidence revealed that she was still biologically able to have children. The plaintiff expressed her desire to have children in the future and claimed the cost of caring for them. This claim was rejected and instead an award for general damages was made, to compensate her for her loss of ability to have children. The trial judge noted that:

¹¹⁹ R West, 'The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory' (1987) 3 *Wisconsin Women's Law Journal* 81, 100.

¹²⁰ D Tuerkheimer, 'Street Harassment as Sexual Subordination: The Phenomenology of Gender-Specific Harm' (1997) 12 *Wisconsin Womens Law Journal* 167, 171.

¹²¹ *Hornberg v Horrobin and Ors*, BC9804790, Supreme Court of Queensland Court of Appeal, Appeal No 10477 of 1997.

Far from minimising her loss, expense the plaintiff incurred by embarking upon the adoption of a child or children at a time when her capacity to care to them or indeed even to hold them has been substantially destroyed would involve a failure to mitigate loss and for that reason not be recoverable. In my view it could not be said that the incurring of such expense would be reasonable having regard to the physical incapacity of the plaintiff to give even the most token physical care required by a child.¹²²

This is a classic example of how the tort system tends to 'emotionalise' women's physical injuries, particularly if they are related to her reproductive system or a sexualized part of her body.¹²³ This tendency leads to awards of damages for nonpecuniary (and thus less valued) loss.

The judgment also reveals certain assumptions about the characteristics of a suitable mother, and the effect of children on marriage and relationships. The appeal judge confirmed that what was significant in the case was 'Tanya's capacity ... to discharge the responsibilities of motherhood'. He also refers to the strain children would place on the plaintiff's relationship, should she get married in the future:

Dr Murray's evidence makes clear how much the well being of a tetraplegic who is married depends upon the partner. He said that the incidence of break downs in marriages for spinally injured people is very high. This is because of the stress caused by the high level of involvement in the care of the handicapped partner. This would seem to apply even more so if there is thought of bringing a child into that relationship. When these matters are considered it would follow that the possibility of Tanya becoming a mother is slight. She would need to find a partner who would support her and then go along the three possible paths to motherhood.¹²⁴

Rather than making an award of compensation adequate to provide the support that the plaintiff would need to be able to minimise any difficulties she may have

¹²² *Hornberg v Horrobin and Ors*, BC9804790, Supreme Court of Queensland Court of Appeal, Appeal No 10477 of 1997.

¹²³ Finley, above n 48, 860.

¹²⁴ *Hornberg v Horrobin and Ors*, BC9804790, Supreme Court of Queensland Court of Appeal, Appeal No 10477 of 1997.

caring for children, the court condemns her as an unsuitable mother and justifies this decision based on a number of assumptions about 'normal' parenting and relationships.

In summary, the court in *Hornberg* had two options, given that they accepted that Tanya would like, and was physically able, to carry and give birth to children:

1. Award her damages so that she could have children and pay for assistance in physically caring for them.
2. Award her damages on the basis that her loss was emotional because she should not have them in the circumstances.

In effect the court decided that Tanya should 'mitigate her loss' by not having children (the general damages were significantly less than the cost of almost full-time child care for fifteen years). The court did recognise her loss, but categorised it as a particular type of loss by enforcing her choice not to have children, rather than letting her choose to have children and pay a carer to help raise them. The court refused to pay the cost of care because having someone else do the full time physical work of child raising was not seen as acceptable mothering. In a sense this is not about recognising a harm *per se*, but about choosing between two interpretations of what the harm was. The court in effect required Tanya to conform to a certain standard of behaviour that would give rise to a particular kind of harm. The court wanted her to be passive - by not becoming pregnant and having children - and they compensated her on the basis that that is what she would (should) do. The harm was categorised in such a way as to be consistent with a valued state (what is valued about mothering abilities), so that the harm was interpreted as causing Tanya to be unable to have children, rather than as Tanya saw the harm (which was causing her to be unable to do certain physical care activities after her children were born). The decision relied heavily on a certain stereotype of what a 'mother' was like and should be able to do. The harm claimed by Tanya was not recognised because it affected a non-valued state (an inappropriate state of mothering).

In the same way that women are prone to particular sorts of harms, immigrants are typically prone to occupational injuries such as repetitive strain and back injuries. In addition, for many immigrants, the workplace is a major source of

social interaction, so incapacity for work can lead to isolation and loneliness. For male immigrants it can also lead to losses of personal and social worth when they can no longer financially provide for their family.¹²⁵ As such, an immigrant may feel that they have suffered a more severe loss than with the average Australian male, however this may not correlate to a higher level of compensation as these losses may not be recognised.

In other cases, attributes specific to particular characters may not be valued by the dominant culture and thus injuries that affect those attributes may not be recognised as significant harms. For example, a male construction worker who takes an unusual, perhaps even stereotypically feminine, pride in his appearance, will have considerable difficulty arguing that he should be compensated for his particularly severe suffering as a result of his appearance being marred by a facial scar. Although he will be likely to have to spend additional time and energy convincing the decision maker of his special suffering in this respect, his particular pride, although perhaps unusual for a male, is not likely to be seen as morally wrong. In contrast, a married man who previously received considerable pleasure from participating in regular anonymous sex with men at local beats during his lunch hours is unlikely to be able to have this enjoyment recognised and notionally restored, if due to injury he is unable to continue to engage in this activity. This is because the activity is likely to be seen as morally wrong.

Judges have a great deal of difficulty understanding harms suffered by people who do not fit the stereotypes. For example, in *Higgins v TNT Express Worldwide (Aust) Pty Ltd*¹²⁶, a lesbian woman who suffered an impairment to her back as a result of a workplace injury, claimed that her sexual relationship with her female partner had been interfered with due to her physical and emotional condition. As the appeal judge perhaps understated it: 'the assessment of the extent of the permanent loss of capacity to engage in sexual intercourse posed some difficulties'. The trial judge had assessed damages by reference to Section 43 of the *Workers' Rehabilitation and Compensation Act 1986* which provided for a lump sum payment for a permanent disability. The Third Schedule to the Act categorised types of permanent disability, including 'the permanent loss or

¹²⁵ D Stewart, 'Workers' Compensation and Social Security: An Overview' (1986) 63 *Social Welfare Research Centre*, 80.

¹²⁶ SA SC, Perry J, 31 August 1995, unreported BC9503778.

impairment of the capacity to engage in sexual intercourse'. Although the appeal judge approved of the magistrate's rejection of the respondent's argument that the words 'sexual intercourse' were limited to the common dictionary definition referring to the insertion of the penis into the vagina followed by ejaculation, he still restricted the meaning of the phrase to acts involving penetration:

Be that as it may, it seems to me that, having regard to the ordinary and natural meaning of the words according to modern usage, the words 'sexual intercourse' would be apt, for example, to describe the penetration of the anus of a person of either sex by the penis, and penetration of the vagina or anus of a female by any part of the body of another female, or for that matter, by the use of an object.

It is by no means clear that what the plaintiff refers to in her evidence as 'sexual intercourse' is the same thing that the judge understands by the phrase. In effect, the appeal judge defines any other sexual activity which does not involve penetration to be merely 'foreplay'. A large amount of time in the trial appears to be aimed at establishing exactly what the plaintiff and her partner did in bed, even including a series of questions aimed at identifying how many different positions they assumed.

The appeal judge finally refused to interfere with the trial Magistrate's allowance for non-economic loss relating to her reduced capacity to engage in sexual activity, stating that it was:

impossible on the evidence given by the plaintiff to determine what, out of the various activities commencing with foreplay and proceeding to the termination of particular sexual encounters, constituted sexual intercourse as opposed to matters falling short of or outside of sexual intercourse.

In other words, the court had difficulty understanding how, exactly, the plaintiff claimed to have been harmed, and resolved the issue by denying her any compensation for this alleged harm. This is yet another example of how the legal injury narrative can maintain the status quo, and in particular, the attributes and behaviours seen as valued by society, in a way which perpetuates a lack of understanding and discrimination against those who do not fit the stereotype of normality.

7.5 Conclusion

In this chapter I have identified the relevance of the plaintiff's virtue in the legal injury narrative, particularly its relationship to the plaintiff's suffering. My examination of the legal injury narrative has also revealed that notions of virtue can have a significant impact on a plaintiff's case, even when the attributes of virtue are strictly speaking not legally relevant.

The plaintiff's virtue is inherently linked to the status quo, thus preventing society's values from changing or developing over time. This in itself would not be a concern, except that it appears that there is still considerable discrimination and inequality in relation to how virtue is defined for different characters who may be cast in the plaintiff role. This is being perpetuated by the legal injury narrative. Also worrying is the fact that virtue is defined and assessed by a particular class of people: in Australia the upper-middle class older men who are usually cast in the judge role.

Chapter 8

The Judge, Proof, and Reward

Introduction

One of the main aims of negligence actions for personal injury and one of the main benefits for injured people in bringing such an action is the award of damages made in favour of successful plaintiffs to compensate them for their injury and consequential losses. Previous chapters have considered various attributes required of plaintiffs in order to make them eligible for such an award of damages. This chapter considers how plaintiffs must go about proving their entitlement to compensation and the appropriate quantum of damages. It also questions whether awards of compensation in fact further the aims of tort law and provide an appropriate remedy for injured people.

This chapter aims to demonstrate that the mechanisms of proof in the legal injury narrative result in an inequitable and sometimes arbitrary decision about whether particular plaintiffs are entitled to compensation. It argues that these mechanisms also reinforce the plaintiff's dependence on others in order to have his or her suffering alleviated. Finally, the chapter proposes that awards of compensation are largely ineffective in alleviating plaintiffs' suffering and restoring the status quo.

The chapter first considers the role of the judge in melodrama and the legal injury narrative, and the judge's function as the dispenser of 'dream justice'. Secondly, mechanisms of proof are discussed, including reliance on documentary evidence and assistance from authority figures such as lawyers and medical experts. Particular consideration is then given to the requirement that the plaintiff prove her or his suffering and the difficulties and inconsistencies inherent in that process. Finally, the notion of reward in melodrama and the legal injury narrative, and its supposed link to 'dream justice' is explored.

8.1 Role of the Judge

*'...the Father figure is the signifier of signifiers, the transcendental sign and origin of truth.'*¹

The only character who can authoritatively resolve the legal injury narrative is the judge.² In both classical melodrama and the legal injury narrative, judging is largely carried out by older men. Although Australia now has female judges, they are a distinct minority. Male judges still far outnumber the few Australian female judges. In the High Court of Australia, as a result of the retirement of Justice Mary Gaudron in January 2003, there is now no woman on the bench. Those women who are on the bench are also arguably those who have achieved that position based on their adoption of masculine characteristics, at least in relation to their method of judging. Aristodemou argues that female judges tend to be women who have succeeded within the system rather than changing it, so that the patriarchal hierarchies and rules remain intact.³

The judge's role as protector of the plaintiff is based on the premise that the plaintiff is someone in need of protection. Thus, the judge's role reinforces the fact that an injured plaintiff is unable to independently control their own destiny. The legal injury narrative reinforces the plaintiff's relative powerlessness and need for the assistance of the judge and other authoritative figures. Given the plaintiff role's feminine attributes, and the judge's masculine ones, the legal injury narrative in this respect also contributes to the embedding of traditional gender relations.

The judge in the legal injury narrative is generally a finder of fact, not law. Although the judge may also have to address questions of law, such as whether a duty of care exists, in doing so the judge is not questioning existing legal frameworks. In many cases the main issues in dispute are whether the standard of care has been breached and how much compensation should be awarded. Galligan explains that in personal injury suits, broad legal standards such as reasonableness and foreseeability give the decision maker a great deal of

¹ M Aristodemou, *Law and Literature: Journeys from Her to Eternity* (2000) 49.

² Although the plaintiff and defendant may choose to settle their dispute prior to coming before a court, this kind of resolution is not an authoritative one. Such settlements generally do not involve an expressed admission of liability by the defendant, and also do not include any public recognition of the plaintiff's undeserved suffering. By nature, these agreements are private.

³ Aristodemou, above n 1, 163.

flexibility, and the legal rules fade out of view, making it difficult to distinguish fact from law.⁴ The main issues are factual ones and the legal rules are not able to be challenged. For example, there is no room for a plaintiff to argue that, although the defendant was not technically negligent, she should be awarded compensation for her injuries. If the defendant is not legally liable, the judge must find against the plaintiff. The legal injury narrative does not allow a compassionate bending of the rules. This appears consistent with West's argument that, in masculine legal justice, compassion and care for the litigants is not a fundamental value in the judging process.⁵

In melodrama and the legal injury narrative, the judge must make decisions in an unemotional manner. Although a judge may feel compassion for the heroine's or plaintiff's plight, his decision will be based on and expressed in fairly unemotional terms. This requirement is demonstrated explicitly in melodramatic theatre. For example, in *Coelina*, when Dufour is confronted by the evidence of Coelina's illegitimacy, his immediate reaction is anger towards Francisque:

DUFOUR. (To FRANCISQUE) How could you? Not content with having dishonored my brother, you dare intrude here seeking my sympathy and allowing me to contract this shameful alliance. Go! Get out, and take her with you.

When he realises the consequences of his decision on Coelina, his emotions start to get the better of him:

DUFOUR. (Turning abruptly) Stop! You have no means of support; no place to go. Where will you take this child? What will become of her? Must she die in poverty because her father has dishonored himself? Here is my purse. When this is gone, tell me where you are and I will send you more.

DUFOUR. Ah! Poor child! It is not your fault....

However, once another character (Stephany) notices his expression of compassion, Dufour immediately reverts to his unemotional, rational determination:

⁴ T C Galligan Jnr, "The Tragedy in Torts" (1996) 5 *Cornell Journal Law and Public Policy* 139.

⁵ R West, *Caring for Justice* (1997) 23.

DUFOUR. (Brusquely) Nothing! Nothing! I say that I'm driving them away; I no longer wish to see them. Go...leave me, I tell you.

In personal injury litigation, judges frequently express sympathy for a plaintiff's position, prior to concluding in effect, that their hands are tied, and the law requires them to find against the plaintiff. In many instances, their comments have a startling similarity to those of Dufour in *Coelina*. For example, Lander J in *Delahunt v Westlake & Anor* upheld the decision of the trial judge, finding against the plaintiff. He stated: 'As I have said in these brief reasons the appellant is entitled to the utmost sympathy for the tragic consequences of this fall but regrettably, so far as the law is concerned, those consequences are the result of 'an accident''.⁶

Melodrama condemns the judge who makes his decision based on an emotional response, and emphasises the importance of rational decision making based on the law and objective proof. He should not be 'quick to judge',⁷ or 'always ready to believe the worst and to pronounce judgment'.⁸ The judge must ensure that he is provided with sufficient information and evidence to support his decision. For example, in *Coelina*, Dufour refuses to accept that Truguelin is truly 'a scoundrel' until he has proof. The doctor Andrevon, an inherently credible witness, is able to provide this proof ('Oh! You want proof? I'll give you proof!'), by identifying Truguelin as the man who viciously beat and mutilated Francisque some eight years earlier.⁹ Andrevon also holds documentary evidence of this: a letter in Truguelin's handwriting. He encourages Dufour to make further inquiries to determine the truth about Coelina's birth, and sets off with him in search of Coelina and Francisque.

In the legal injury narrative similar themes can be found. Judges decide based on reason rather than emotion, and must decide based on objective proof. In both kinds of narratives (melodramatic theatre and the legal injury narrative), proof can be provided by documentary evidence, and by the assistance of authoritative characters with particular insight into the matters at hand.

⁶ *Delahunt v Westlake & Anor* (2000) Aust Torts Reports ¶81-542, 39.

⁷ Dufour in *Coelina*.

⁸ As Trugelin accuses Dufour in *Coelina*.

⁹ See also *La Femme à Deux Maris*, in which Edouard de Fersen confronts Fritz with "irrescusable proof" of Fritz's guilt.

8.2 Documents

Documentary evidence is very important in melodrama. Brooks notes that melodrama is full of ‘papers and parchments, forged or authentic, which are produced to establish true or seeming proof of moral identity’.¹⁰ For example, in *Coelina* there are three important documents that provide proof of Coelina’s virtue: her birth certificate, the letter in Truguelin’s handwriting, and Francisque’s letter of explanation.

In the legal injury narrative, documents are also fundamental to proving the plaintiff’s claim. Verbal signs of pain and suffering are generally unstable and unreliable. Accordingly, the decision maker frequently relies on other more visible representations of pain such as gestures and marks on the body (see below) and documentary evidence. Documents such as hospital and medical records must exist to prove the plaintiff’s pain and suffering. However, in some cases even the documentary representation will not be easy to interpret. For example, an x-ray might reveal otherwise hidden fused vertebrae in a plaintiff’s spine that explains her reported pain. Without special training, however, a judge is unlikely to be able to fathom the meaning of the x-ray. Accordingly, medical experts are also useful to interpret documents and translate other non-verbal messages.

8.3 Authority Figures

Before the judge in melodrama makes any definitive decision, he hears from authoritative others. For example, Dufour takes advice from the doctor Andrevon who is ‘the most sensible man in Savoy’. Similarly, in *Le chien de Montargis*, the Seneschal is assisted in his investigation by Chevalier Gontran, the Captain of the company of soldiers. In the legal injury narrative the judge also takes advice from authoritative others, such as lawyers and doctors, before making a decision.

Lawyers play a fundamental role in the legal injury narrative, particularly those representing the plaintiff. In the melodramatic trial ‘virtue’s advocates deploy all arms to win the victory of truth over appearance and to explain the deep meaning

¹⁰ P Brooks, *The Melodramatic Imagination* (1976) 39.

of enigmatic and misleading signs'.¹¹ As previously discussed, the plaintiff's mute role requires that someone speak on his or her behalf. In the legal injury narrative the lawyer is the main character who speaks for the plaintiff. Miller notes that 'accident victims seldom possess the skills of advocacy and argument necessary to be effective in pressing their claims for individual redress'.¹² An injured person needs a lawyer to tell their story in accordance with the legal injury narrative, so that the decision maker can then adjudicate on their right to compensation.

The role of the lawyer in speaking for the client was examined by Clark Cunningham in his article *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*.¹³ He suggested that there were three possible ways in which a lawyer could represent a client: by taking the place of, or acting the part of the client; by re-representing what the client had originally told; or by creating a representation of the client.¹⁴ In the legal injury narrative the personal injury plaintiff lawyer is not acting the part of the client. The personal injury lawyer has his or her own role in the legal injury narrative as the plaintiff's helper. The lawyer is rather like the characters in melodramatic theatre who support the heroine, such as a comic woman who serves or befriends the heroine¹⁵, or an elderly man who never fails to doubt the heroine's virtue.¹⁶

In the legal injury narrative, the lawyer's role is not to re-present what the client has told, as the client is legally mute and rarely expresses the kinds of stories needed in a courtroom setting. In the legal injury narrative the lawyer is in fact creating a representation of the client, somewhat like a novelist. In particular, the lawyer is creating a representation of the client's virtue. However, Cunningham points out that lawyers do not 'write the script', so to speak, they are more like directors of the film. He suggests that an appropriate analogy may be that the lawyer writes the subtitles to a foreign language script. In this sense

¹¹ Ibid 31.

¹² R S Miller, 'Tort Law and Power: A Policy-Oriented Analysis' (1994) 28 *Suffolk University Law Review* 1069, 1078.

¹³ C D Cunningham, 'The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse' (1992) 77 *Cornell Law Review* 1298, ; C D Cunningham, 'A Tale of Two Clients: Thinking About Law as Language' (1989) 87 *Michigan Law Review* 2459.

¹⁴ Cunningham 'A Tale of Two Clients: Thinking About Law as Language', *ibid* 2460.

¹⁵ M R Booth, *English Melodrama* (1965) 35.

¹⁶ P Brooks, *The Melodramatic Imagination* (1976) 33.

Cunningham embraces the notion of the lawyer as translator – allowing clients to be heard and understood in places where otherwise they are mute.¹⁷ He acknowledges that the metaphor of lawyering as translation cannot fully express the meaning of the lawyer's experience.¹⁸

The problem with this notion of lawyer as simply a translator is that it assumes the client says everything that the lawyer needs to know, without the need for prompting by the lawyer. However, in practice, the lawyer needs to direct the client about what to tell in the first place, by asking appropriate questions. The lawyer knows what elements are required for the legal narrative and searches for that information. In doing so, the lawyer sometimes also excludes from translation things that the client has said. For example, Sarat and Felstiner's study showed that the lawyers could not readily translate their clients' talk of moral responsibility into the language of no-fault divorce law. This illustrates the point that about some matters, the client is muted to a point where the lawyer is simply unable to speak for them.

In the trial itself, the lawyer does much more than translate. The lawyer asks the questions of witnesses to elicit information, but they also formulate their client's story in opening and closing statements. In particular, the lawyer plays a fundamental role in constructing the client's virtue in a public and acceptable fashion.

Medical practitioners are also called upon to prove the plaintiff's suffering. Medical experts, like lawyers, are valued as authoritative experts due to their rational observations.¹⁹ Evidence from a medical practitioner about a plaintiff's pain enables that pain 'to enter into a realm of shared discourse that is wider, more social, than that which characterizes the relatively intimate conversation of patient and physician'.²⁰ The '...success of the physician's work will often depend on the acuity with which he or she can hear the fragmentary language of pain, coax it into clarity, and interpret it'.²¹

¹⁷ W A Kell, 'Voices Lost and Found: Training Ethical Lawyers for Children' (1998) 73 *Indiana Law Journal* 635, 641.

¹⁸ C Cunningham 'A Tale of Two Clients: Thinking About Law as Language', above n 13, 2491.

¹⁹ A Mann, *The Medical Assessment of Injuries for Legal Purposes* (3rd ed, 1979) 3.

²⁰ E Scarry, *The Body in Pain: The Making and Unmaking of the World* (1985) 9.

²¹ *Ibid* 6.

In many cases the doctor simply restates the patient's subjective reports of pain.²² However, a medical practitioner is also often able to objectify the plaintiff's subjective experience of pain by comparing it with what sort of pain should be felt by the plaintiff. In other words, the doctor describes the pain 'likely to be felt' by anyone experiencing such an injury.²³ Medical experts are fundamental to a very important part of the plaintiff's case: proof of suffering.

8.4 Proof of Suffering

In melodrama the judge is well aware of the heroine's suffering – in many cases they are instrumental in it occurring because they have ceased to recognise the heroine's virtue. For example, in *Coelina* it is Dufour who banishes Coelina and refuses to let her marry Stephany; in *Les ruines de Babylon* it is the King who banishes Zaida and separates her from her husband and son; in *Le chien de Montargis* it is the Seneschal who orders that Eloï be taken before the court and orders his execution. Accordingly, in melodrama the judge often recognises in advance the suffering that the heroine is about to endure. However, in the legal injury narrative, much of the plaintiff's suffering has taken place largely before the judge has had the opportunity to consider the matter. Accordingly, it is not only the unjustness of suffering that must be proven, but the extent of the suffering itself.

The plaintiff must prove her suffering so that she is entitled to the benefits that the plaintiff role provides. This requirement that the plaintiff prove her victim status is not only found in personal injury litigation. In her study of rape law and romance fiction, Larcombe reveals how the rape complainant's victim-status is itself the subject of legal investigation, discovery and determination:

The complainant's self perception as victimised is thus only provisionally accepted by the criminal justice system pending testing and consideration of the evidence.²⁴

In a personal injury trial the plaintiff's victim status is similarly suspended, pending proof of suffering.

²² For examples see Appendix 3.

²³ For examples see Appendix 4.

²⁴ W Larcombe, *Compelling Engagements: Feminism, Rape Law and Romance Fiction* (2005) at 64.

In melodrama, everything must be said, even the unspeakable.²⁵ The characters must clearly vocalise and demonstrate to the audience their status of virtue or villainy, and the lesson of their relationship.²⁶ The plaintiff must also verbally express her suffering. However, there is an inherent conflict between this need to speak and the muteness of the plaintiff role.

There are particular problems with expressing pain and suffering. Elaine Scarry notes that physical pain is difficult to express and that this gives rise to political and perceptual complications.²⁷ In the context of the legal injury narrative, one could also say that legal complications arise. Scarry talks about two aspects of pain: 'unmaking' – based on the notion that pain is language destroying, and 'making' – the concept of imagining and verbalising pain. These two aspects reflect the paradox of the text of muteness in melodrama and the legal injury narrative. The plaintiff's suffering is 'unmade' in the sense that it is often impossible to express in language. However, in the trial there is a need for others to be able to 'make' her suffering real by imagining and verbalising it.²⁸

Given that physical pain resists objectification in language, the focus must move out of the body into the external circumstances that can be pictured as having caused the hurt.²⁹ This again reinforces the melodramatic nature of the legal injury narrative – shifting the focus on to the defendant as the cause of the plaintiff's suffering. The plaintiff is relegated to the status of the object of the defendant's actions: the plaintiff's body the physical demonstration of the consequences, and the plaintiff's mind mute and irrelevant.

Another paradox in the legal injury narrative involves the conflict between suffering in silence and the requirement that the plaintiff complain of pain to others. The legal injury narrative requires the plaintiff with a physical injury to complain often and contemporaneously of pain. The cases indicate that, in order to be believed, the plaintiff should complain about pain contemporaneously with

²⁵ See general discussion in Brooks, above n 1, 42.

²⁶ Ibid 4.

²⁷ Ibid.

²⁸ Proof of suffering by reference to objective evidence (such as evidence of medical experts and reference to medical records and other documents such as x-rays) is discussed in more detail in Chapter 8.

²⁹ E Scarry, *The Body in Pain: The Making and Unmaking of the World* (1985) 16.

the injury and then consistently at every opportunity to every doctor he or she visits.

The plaintiff should attend a medical practitioner immediately after the accident giving rise to the injury and complain of pain. This is treated as evidence of the genuine nature of the plaintiff's complaints and is often commented on by the judge. For example, in *Umback v Wallace & Anor*, the judge stated:

I am satisfied that the plaintiff attended her general practitioner immediately after the accident and complained of neck and low back pain...³⁰

Although the connection between immediate complaint and genuineness seems to be a matter of common sense, the following extract from *Stankovic v Banfield* reveals the way in which medical practitioners are often called upon to give authoritative support to this 'normal' conduct.

Dr Knox described in his report how he believed a person in this condition would complain of pain on the first indication of symptoms when under formal examination...³¹

Ideally, these complaints should continue and remain consistent and be recorded by the doctor, as demonstrated by the following extracts from personal injury judgments:

The plaintiff has continued to complain of constant back and neck pain...³²

Dr Ong continued to record complaints of recurrent back pain.³³

I find, however, that he did continue to make complaints of neck pain.³⁴

Reports from Dr Stevenson...confirm the plaintiff's ongoing complaints of neck and back pain.³⁵

His evidence and his complaints to the doctors are, on the whole, consistent.³⁶

³⁰ *Umback v Wallace & Anor, Umback v Kelly* [1999] ACTSC 113 at 405-409.

³¹ *Stankovic v Banfield* [2000] ACTSC 8 at 148-151.

³² *Dass v Firfai & Anor* [1999] ACTSC 67 at 211-212.

³³ *Nguyen v Bucis* [1999] ACTSC 84 at 115-116.

³⁴ *Blazeski v City Group Cleaning Contractors* [1999] ACTSC 69 at 203-207.

³⁵ *Stankovic v Banfield* [2000] ACTSC 8 at 116-117.

The following extracts reveal that when the plaintiff has not complained of pain, her credibility is called into question:

In a case where the claimed symptoms are not otherwise objectively verifiable, and it is not suggested that there is any spinal damage in this case, it is difficult to accept a plaintiff's history of ongoing symptoms when there are contemporaneous treatment notes covering the period in question which, while recording regular complaints of various ailments, make no mention of the symptoms complained of.³⁷

However, there is no record of her complaining of back pain to any of the doctors before her complaint to Dr Newcombe in 1987.³⁸

Total absence of any contemporaneous complaint to a medical practitioner.³⁹

Ironically, however, the requirement that a plaintiff verbalise complaints of pain can work against a plaintiff's credibility if she complains too much, as was alleged in the case of *Simonfi v Fimmel*:

I can only say that the signs are negligible and the complaints are multiple.⁴⁰

Such a plaintiff is at risk of being categorised as a victim-as-manipulator (See Chapter 6).

The characteristic of muteness is also evident in an injured immigrant's dealings with medical practitioners. If the immigrant suffers from an injury that is not easily detectable or able to be confirmed by objective evidence, it can be very difficult for the immigrant to gain recognition of his or her suffering.⁴¹ This may be due to the immigrant's difficulty in expressing themselves in English, their different cultural responses to symptoms and suffering, or due to the medical

³⁶ *Artur Fatur v IC Formwork Services Pty Ltd and Civil and Civic Pty Ltd* [2000] ACTSC 14 at 410-411.

³⁷ *Buttriss v Buttriss & Ors* [1999] ACTSC 121 at 88-93.

³⁸ *Risteska v The Commonwealth of Australia* [1999] ACTSC 56 at 140-142.

³⁹ *Umbach v Wallace & Anor, Umbach v Kelly* [1999] ACTSC 113 at 25-30.

⁴⁰ *Simonfi v Fimmel & Simonfi v Dowden & Anor* [2000] ACTSC 54 at 471-472.

⁴¹ V Lin and W Pearse, 'A Workforce at Risk' in J Reid and P Trompf (eds), *The Health of Immigrant Australia: A Social Perspective* (1990) 229.

practitioner's preconceived ideas about immigrants and their tendency towards malingering.

Where the plaintiff is mute, gesture becomes important, particularly with respect to proof of pain. A judge will often refer specifically to the plaintiff's physical movements in the court room as evidence of his or her pain and suffering. For example, in *East v King*, the judge commented:

It is important in this case to record that the plaintiff needs to be seen in presentation, and to watch her struggle with ordinary activities like moving from the Court floor into the witness box and trying to speak. Her speech and her mobility are both impaired, and I observed many times that she moved her hands with a type of spastic waving.⁴²

Witnesses to the accident itself are also frequently called to describe the plaintiff's gestures and demeanour after the injury. They can give evidence about how they saw her attempt to lift a heavy object, how she dropped it and cried out, clutching her back, how she appeared to have difficulty walking away, her face grimacing. This information is useful, as we all recognise certain common responses to pain in another person. We know what pain sounds like, we know what a person in pain looks like, we know how a person in pain moves. However, the problem with this universal knowledge is that it allows people to mimick pain where there in fact is none. As Scarry puts it, 'hearing about pain' may exist as the primary model of what it is 'to have doubt'.⁴³

Lawyers speak therefore attempt to speak authoritatively on behalf of the plaintiff 'to communicate the reality of that person's physical pain to people who are not themselves in pain'.⁴⁴ This can be extraordinarily difficult in cases where there is pain without any remaining actual bodily damage or disability, where the injured bodies do not themselves bear the record of suffering.⁴⁵ To compensate for the lack of language for pain, lawyers need to revert to the 'language of agency' to communicate. Scarry explains this as the verbal sign of the weapon.⁴⁶ In other words, the plaintiff's lawyer needs to specify an external agent of the

⁴² *East v King* [1999] NSWSC 314.

⁴³ *Ibid* 4.

⁴⁴ *Ibid* 10.

⁴⁵ *Ibid* 298.

⁴⁶ *Ibid* 13.

pain (a weapon which produces the pain).⁴⁷ In the legal injury narrative, the active agent is the defendant, who is portrayed as the cause of the plaintiff's suffering. This again reinforces the focus on the defendant, emphasising individualised blame and diverting attention from societal factors that cause or contribute to suffering.

8.5 Reward

The judge may award the plaintiff compensation for her suffering. Although this compensation is notionally paid by the defendant, in practice it is often provided by an insurer. This is, however, consistent with melodrama, in which the reward is often provided to the heroine by someone other than the villain, following an order or recommendation by the father-figure. In any event, in melodrama, and the legal injury narrative, reward is secondary to the recognition of virtue.

8.5.1 Reward in Melodrama

In melodrama, once the heroine's virtue is recognised, it is frequently rewarded in some way. For example, in *Coelina*, Dufour gives Coelina the benefit of her previously expected inheritance through his son, even though she is technically not entitled to it in her own right.

DUFOUR: Tomorrow you will be joined in marriage. (To STEPHANY)
By law, my brother's wealth reverts to me; I bestow it upon you.

STEPHANY: In order to restore it to Coelina.

DUFOUR: Exactly.

However, it is important to note that Coelina is never actually restored to her previous position, in that she no longer has the status of the child of a nobleman. However, she is given a kind of replacement status as Stephany's wife. Interestingly, both her inheritance and her status are endowed on her as a result of her marriage, not as an individual. In addition, both of these things are only available to her as a result of Dufour's benevolence. This reinforces her role of passivity and submissiveness to men.

Similar offers of reward are made to the protagonist by a character in the judge role in many of Pixérécourt's melodramas. In *Le chien de Montargis*, when

⁴⁷ Ibid 15.

Eloi's innocence is revealed, Gontran, the Captain of the company of King's soldiers informs him: 'Young man, the King shall know of this. I intend to ask him to compensate you for the ordeal to which you have been subjected.' In *La fille de l'exilé* when the Tartars' are told of Elizabeth's extreme generosity in attempting to protect Ivan, they acknowledge her virtuous nature. Their leader, Alterkan, exclaims 'Astonishing woman, take this gold' and offers his purse to her. In *L'homme a trois visages*, when Vivaldi's identity is revealed, the Doge recognises his honorable nature, exclaiming 'Generous Vivaldi! How can the state ever discharge its debt to you and make you forget its injustice?'

However, in melodrama we never actually see the reward bestowed on the protagonist. The plays always end before the act takes place – before Coelina's marriage, before Gontran approaches the King, before the Doge actually discharges his debt to Vivaldi. Alternatively, the reward is refused, such as when Elizabeth does not accept the gold from Alterkan (although her real reward for virtue comes later in the play). This is because the reward of virtue is only a secondary manifestation of the recognition of virtue.⁴⁸ The aim of melodrama is not reward for misfortune but the recognition of the signs of virtue along the way.

8.5.2 Reward in the Legal Injury Narrative

Once the plaintiff's claim is recognized in the legal injury narrative, an award of compensation for suffering follows. An award of damages compensates for financial and non-pecuniary losses. Generally speaking, the role of damages in tort law is to compensate the plaintiff for any loss suffered as a result of the defendant's negligence: 'A plaintiff who has been injured by the negligence of the defendant should be awarded such a sum of money as will, as nearly as possible, put him in the same position as if he had not sustained the injuries'.⁴⁹ This fiction of restoration is typical of melodramatic narratives. However, just as Coelina is never really restored to her previous state of virtue, a personal injury plaintiff is also never actually returned to the pre-injury state. Compensation is a substitute for the impossibility of putting the plaintiff back in that state.

⁴⁸ Brooks, above n 16, 27.

⁴⁹ Gibbs CJ and Wilson J in *Todorovic v Waller* (1981) 150 CLR 402, 412.

The notion of compensation as a type of punishment imposed on the defendant has been criticized by tort theorists, particularly in light of the fact that most damages awards are now paid by an insurer.⁵⁰ However, consideration of the role of compensation through the light of the legal injury narrative provides some new insight into this contentious issue. In melodrama the reward provided to the heroine never comes from the villain. It is always paid by some other character, often a father-figure. However, when we consider that in melodramatic narratives, reward is only secondary to recognition, the relationship between the defendant and compensation in the legal injury narrative becomes less important. So long as the defendant's negligence and the plaintiff's undeserved suffering are publicly recognized (as they are in a public trial) then the actual payment of compensation is incidental so far as the law is concerned. The defendant's punishment occurs by public condemnation and humiliation, rather than by financial penalty.

8.6 Conclusion

In the legal injury narrative an award of compensation functions as the reward for the plaintiff's virtue and undeserved suffering. Although an award of compensation is generally the goal of the plaintiff in undertaking litigation, it is arguably not the sole function of the legal injury narrative. If we consider the legal injury narrative's role as providing moral instruction and reinforcing the status quo, then the element of compensation is secondary to the public recognition of the plaintiff's virtue.

I argue that the legal injury narrative's dependence on paternal benevolence means that it tells the story of an injured person watched as a spectacle, rather than writing and directing the spectacle herself.⁵¹ The notion of reward also has the effect of subtly prioritising money over emotional well-being, particularly by compensating the inability to work more highly than emotional suffering, and by the overriding assumption that money can alleviate suffering.

⁵⁰ For example see D Dewees, D Duff and M Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (1996) 6-8.

⁵¹ Aristodemou, above n 1, 78.

Chapter 9

Implications and Conclusions

*[Melodrama's] happy end is often impossible, and, what is more, the audience knows it is impossible. Furthermore, a 'happy end' which takes the form of an acceptance of castration is achieved only at the cost of repression.'*¹

Introduction

As we have seen in the previous chapters, the legal injury narrative is inherently melodramatic. It provides a framework for the telling of explanatory stories about accidental injuries and their consequences. Reading the legal injury narrative as melodrama reveals new insights and confirms some existing concerns about tort law's response to accidental injury, the power relationships and normative values underlying the law, and the potential for the law to perpetuate inequality and discrimination.

The first few chapters in this thesis revealed the potential for narratives to be normative. In particular, melodramatic narratives tend to be hegemonic in that the genre of melodrama has the particular aim of restoring the status quo. Law is also a normative discourse. When law and melodrama meet, melodramatic legal narratives have great normative power. In William Morse's words, because the legal injury narrative is 'articulated within the dominant essentialist discourse, [it] primarily provide[s] escapist controls that support and solidify the political status quo'.²

This thesis has examined the characteristics of the status quo, as well as the normative assumptions and stereotypes perpetuated in the legal injury narrative. It has revealed the way in which the legal injury narrative relies upon and reinforces the polarities of the masculine and the feminine, and of virtue and evil. The legal injury narrative has been shown to require an injured plaintiff to comply with certain attributes of the role, particularly passivity, muteness and virtue. How these attributes are assessed, and their effect on different types of characters who might be cast in the plaintiff role has also been discussed. The

¹ G Nowell-Smith, 'Minnelli and Melodrama' (1977) 18 *Screen* 105, at 117.

² W R Morse, 'Desire and the Limits of Melodrama' in J Redmond (ed), *Melodrama* (1992) 17, 18.

role of defendant and the process of individualising blame was also considered. Finally, the role of the judge, the process of proof and the function of reward were covered.

This concluding chapter will discuss the effect of the legal injury narrative on personal injury plaintiffs in general, women and immigrants in particular, and on society as a whole. It argues that there is a clear relationship between the legal injury narrative and personal injury litigant's poor health outcomes. It will also suggest some possible alternatives that might avoid some of the negative consequences of the current system for claiming compensation for personal injury. Finally, this chapter will make some recommendations for further enquiry and research.

9.1 Effect on Plaintiffs

Reading the legal injury narrative as melodrama has revealed the essential characteristic of the plaintiff role as one of passivity: in relation to the causation of, and response to, the plaintiff's suffering, as well as the resolution of the narrative. The best way for plaintiffs to have their suffering alleviated is to be passive and to conform to existing stereotypes and normative expectations. However, there are significant negative consequences impacting on both plaintiffs who can and those who cannot comply with these norms.

Inherent in this passivity is a dependence on others, including lawyers, doctors and judges. The legal injury narrative thus promotes the fact that people suffering should comply with authority figures who know better than they do about what is good for them. However, when authoritative figures have the power to choose whether a plaintiff's suffering should be alleviated, those figures also have the power to set their own criteria for deservedness. The plaintiff has little capacity to challenge those criteria. When the criteria are based on discriminatory and unrepresentative stereotypes, narratives such as the legal injury narrative perpetuate this discrimination and ignore or repress the unrepresentative nature of those criteria. (see further below in social consequences)

The legal injury narrative assumes that everyone is 'normal' and discriminates against those who are not seen to be normal. The legal injury narrative fails to

provide 'justice' to those who are unable or choose not to comply with those stereotypes. 'Abnormal' plaintiffs (that is, those who are seen as having been abnormal prior to, and not as a result of, the injury for which they are now seeking compensation) are discriminated against in that they are held to be undeserving of compensation, or their harms are not recognised adequately or at all. The legal injury narrative silences or ignores anyone not considered normal.

However, apart from the immediate problem that these people are not entitled to have their suffering alleviated, they are also subjected to continuing stigma. The legal injury narrative reveals a number of stereotypical requirements of male, female and immigrant plaintiffs. For example, men should be stereotypically masculine, active, and have a desire to do public work so that they can provide economic security for their families. Women, on the other hand, should be madonnas rather than whores, and should demonstrate the desire to put the needs of their families first. Immigrants should work hard to assimilate themselves into Australian culture, particularly by learning English. Those plaintiffs who do not fit those stereotypes are often socially condemned beyond the context of personal injury litigation, and the legal injury narrative reinforces this.

Even those plaintiffs who can comply with the plaintiff role, although they benefit from receiving the 'dream justice' of the legal injury narrative, may end up suffering in other ways. Adopting the characteristics of the plaintiff role has potentially harmful consequences. As we have seen in the previous chapters, the legal injury narrative is a very limited and simplified account of a person's injury experience. Where a person's injury story is constrained by the limited scope of the legal injury narrative, that person's understanding and experience of the injury is likely to be similarly limited.³ For example, the legal injury narrative's emphasis on individualized blame encourages the plaintiff to focus blame on the defendant, and discourages the plaintiff from acknowledging how his or her own behaviour might have contributed to the accident. Melodrama allows us to 'identify all suffering with that which is due to external causes'.⁴ Heilman points out that because all phenomenon in melodrama occurs outside the human character, we miss the inner action of sentience and responsibility: 'If the

³ J Shotter, *Social Accountability and Selfhood* (1984) 173.

⁴ R B Heilman, *Tragedy and Melodrama: Versions of Experience* (1968) 105.

disaster comes from human evil, it is the evil of others, not ourselves; we are innocent, and we can grieve, if we wish, instead of looking more steadily at ourselves'.⁵ We are without complicity in evil. 'Contemplation may become painful by betraying us at any moment into a sense of our own liabilities, but expending energy in a cause can be a kind of restorative or therapy.'⁶ We prefer finding external villains to blame rather than discovering inner falsities.

A further problem with the fact that injured people are encouraged to redefine themselves according to the plaintiff role is that it has consequences after the personal injury litigation has finished. The characterisation of the plaintiff as passive and weak, which is necessary to enable them to successfully fit their story to the legal injury narrative, can disserve them in other contexts, and can hinder the social response to the problem of accidental injury.⁷ Lawyers are not trained to deal with (and in fact are probably often unaware of) the fact that their clients are reconfiguring their identity during the legal process. The reconfigured incapacity often withstands the 'remedial effects of litigation' and the associated consequences may outweigh the advantages from lawyer-won material benefits.⁸

Accordingly, the legal injury narrative does not support an adaptive resolution to the injury experience, that is, one which involves maintaining generally positive views and reevaluating the experience in a positive light.⁹ In contrast, this sort of positive reevaluation can be seen in non-litigants' injury narratives, which often explain the experience in positive terms, for example 'learning some important lesson – about oneself, about others, or about what's really important in life'.¹⁰

9.2 Effect on Women and Immigrants

Women and immigrants are affected in particular ways by the legal injury narrative and their relationship to the plaintiff role. This thesis has identified that

⁵ Ibid 35.

⁶ Ibid 102.

⁷ Similar to the way in which the image of the battered wife as pathologically weak has disserved them in other legal contexts such as in child custody cases, and has hindered social response to the problem of family violence. See discussion in K Abrams, 'Hearing the Call of Stories' (1991) 79 *California Law Review* 1043.

⁸ A V Alfieri, 'The Politics of Clinical Knowledge' (1990) 35 *New York Law School Law Review* 7, 23.

⁹ R Janoff-Bulman and C E Thomas, 'Self-Defeating Responses Following Victimization' in R C Curtis (ed), *Self-Defeating Behaviors: Experimental Research, Clinical Impressions, and Practical Implications* (1989) 215, 222.

¹⁰ Ibid 223.

the plaintiff role is a feminine one, and that stereotypes of women and immigrants also tend to be characterised by feminine qualities. While this means that women and immigrants may initially be at an advantage, in that it appears easy for them to fit the feminine plaintiff role, they are also disadvantaged in that they may not be seen to have suffered as much as a male character cast in that role. In this sense women and immigrants may be disadvantaged by complying with their respective stereotypes, as there is not a stark difference between their passive and dependent stereotype and the passive and dependent plaintiff role, thus reducing their apparent suffering and the amount of damages awarded for that suffering.

However, women and immigrants who do not fit the stereotype are not necessarily protected from this disadvantage. Failing to fit the stereotype may result in their ineligibility to receive 'dream justice' because they are seen as undeserving, or because their harms are unrecognised. Accordingly women and immigrants are placed in an invidious position in which they are discriminated against by both complying and failing to comply with their respective stereotypes. This also reinforces the fact that the feminine is less valued than the masculine in law and society.

9.3 Effect on Society

In the legal injury narrative, the law 'takes on the role of benevolent father, offering security and comfort' but simultaneously excludes from or fails to convince people such as women and marginalised groups.¹¹ It obscures the fact that 'its history, decisions and stories could have developed in a different manner, taking in other experiences, other views, other voices'.¹² For example, the response to accidental injury could have been one based on community care and support for all rather than only those who can attribute blame to another individual. Melodramatic indignation is an instrument of manipulation, securing blind actions instead of scrutinising options.¹³

The legal injury narrative also makes alleviating suffering an individual rather than a social responsibility. It encourages the idea that suffering is necessary by

¹¹ M Aristodemou, *Law and Literature: Journeys from Her to Eternity* (2000) 25.

¹² Ibid 26.

¹³ Heilman, above n 4, 130.

offering acceptance of future justice, fostering in believers an attitude of resignation and robbing them of energies needed to fight present injustices.¹⁴ It also encourages passivity as the appropriate response to suffering.

9.3.1 Masculine Power

Reading the legal injury narrative as melodrama reveals the hidden but pervasive normative values underlying it. It also emphasises the patriarchal nature of those values and the narrative's male-dominated influences. In particular, it reinforces the dichotomy between the masculine and the feminine (with the feminine being the less valued of the two), the acceptance of male power and authority, the importance of rational (rather than emotional) decision making based on objective proof, and a masculine interpretation of virtue (the characteristics of which are different for men and women). A more detailed consideration of each of these issues follows.

This thesis has revealed that characters in the legal injury narrative, in true melodramatic fashion, tend to be based on the bipolar distinction between masculine and feminine. The masculine is the norm, comprising of the active, able body, and the feminine is the devalued form, passive, dependent and suffering. Feminist legal scholars have pointed out that the stereotypical characteristics of the male legal subject – rationality, independence, autonomy – are held out as the norm for any legal subject.¹⁵ As a consequence, women and men are judged according to how well they meet those valued standards. Women are obviously disadvantaged as defendants when they are judged according to masculine standards.

Reading the legal injury narrative as melodrama identifies existing power relationships and how the narrative reinforces the authority of those in power. In the legal injury narrative it is always the masculine characters who have power, and the feminine characters who depend upon them for the alleviation of their suffering.¹⁶ Judges, medical and other recognised experts, and lawyers are assumed to be the bearers of truth and be reliable arbiters of evidence, even in

¹⁴ Reflective of Camm's criticism of Christianity, discussed in Aristodemou, above n 11, 135.

¹⁵ M Davies, Chapter 2, "Taking the Inside Out" in N Naffine and R J Owens (eds), *Sexing the Subject of Law* (1997) 35.

¹⁶ Although more women are becoming lawyers, judges and medical specialists, they still tend to be characteristic as masculine. See Section 9.1 above.

relation to such private matters as feelings of pain. These authority figures demonstrate the inherently valued practice of rational/logical decision-making rather than emotional care.

This also reinforces the fact that the legal injury narrative privileges the visible and concrete rather than the invisible and intangible / impermanent. Permanent physical scars are seen as more reliable proof of pain and suffering than the derogatory trope of the removable neck brace. Claims of physical injury are considered more credible than claims of emotional harm. Decisions are made based on physical proof rather than instinct and great weight is given to documentary and other concrete evidence.

9.3.2 Causes Of and Responses To Suffering

The legal injury narrative diverts attention from possible criticisms of the status quo and in effect closes off any discussion about it. In particular, it provides a certain amount of comfort by demonstrating the availability of dream justice to those who are suffering, without addressing some underlying causes of that suffering.

Viewing the legal injury narrative as melodrama also emphasises its tendency to simplify the complex causes of accidents into a single and individualised cause. This exacerbates the adversarial context of the litigation, and has two concerning consequences: it precludes the consideration of broader societal causes of suffering, and it encourages injured plaintiffs to focus on blaming the defendant rather than taking responsibility for their own actions and rehabilitation.

The legal injury narrative encourages the seductive pleasure of melodramatic wholeness and closure which diverts attention from inconsistencies and gaps in the story. Society is encouraged to condemn the negligence of the defendant in causing the plaintiff's suffering, and we sympathise with the plaintiff's plight. However, in doing so we also ignore the social structures that might have contributed in many ways to the plaintiff's suffering and we may even have allowed the defendant the opportunity to harm the plaintiff in the first place. Our complicity in allowing those structures to continue is simply the unnoticed background to the story. '[A]ll resources are directed against the enemy...hence

a society can turn its energies of mind and passion away from examining itself.’¹⁷ The legal injury narrative diverts attention from the fact that the aims of tort law, particularly that of compensation, are not effectively achieved.

9.3.3 Diversity and Complexity

Focusing on the melodramatic nature of the legal injury narrative reiterates its tendency to over-simplify complex situations and frequently resort to stereotypes. The legal injury narrative portrays and treats characters as monopathic, leaving no room for dealing with, or even acknowledging, complexity and inconsistency. When characters are treated as one-dimensional, this promotes the fallacy that there is always a clearly obvious right and wrong choice of action. Constantly referring back to the status quo, and its necessary focus on the past, also means that decisions about the appropriateness of past choices are made with the artificial benefit of hindsight.

9.3.4 Stereotypes and Discrimination

It is commonly accepted that one of the aims of tort actions for personal injury is to put the plaintiff back in a position as if the injury had not occurred. However, studying the legal injury narrative as melodrama has allowed us to go beyond a superficial acknowledgment of that general principle, and to critically analyse the reasons behind such an aim. It has also revealed that the principle is actually only a small part of a much broader aim of restoring the status quo, which has potential consequences far beyond the assessment of damages. When read as melodrama, it becomes clear that the legal injury narrative assumes that the status quo *should* be restored, and leaves no scope for criticism of the existing state of affairs. Accordingly, existing inequalities and discrimination are not able to be challenged.

A close study of the legal injury narrative emphasises law’s and society’s different responses to different victims¹⁸ and reminds us that the legal injury narrative is based on notions of innocence and desert, and does not allow any room for non-judgmental care and compassion.

¹⁷ Heilman, above n 4, 105.

¹⁸ Ibid 36.

9.4 Alternatives

If we remove the aspect of blame from the narrative, other options become apparent. For example, the no-fault compensation system in New Zealand is one which theoretically provides support to injured people without the need to identify someone to blame for the injury.¹⁹ Another alternative may be to improve the public health system so that all people suffering injuries are able to access medical and rehabilitation services, irrespective of how they are injured and whether or not they are judged to 'deserve' this support. This kind of system might be described by feminist legal scholars as one based on care and compassion rather than adversarial dispute resolution.

Separating blame from the provision of support to those injured need not mean that people may recklessly endanger others without sanction. A system imposing fines for negligence may well provide the necessary deterrence and punishment functions without compromising the health outcomes of those injured.

9.5 Melodrama or Tragedy?

*'...melodrama presents the joys of war, with its occasional sorrows; and tragedy, the sorrows of peace, with its occasional joys'*²⁰

Heilman explains that 'the abiding problem is to avoid being melodramatic when the tragic is called for, or tragic when the melodramatic is called for, and, still more, to avoid being one while having the illusion of being the other'.²¹ In a sense, Heilman summarises the problem with the legal injury narrative. It is melodramatic when the tragic is called for. Even worse, the legal injury narrative expressly avoids the tragic while supporting the fiction that the plaintiff's experience fits within the genre of the melodramatic.

In particular, melodrama allows us to act on the hopeful theory that all suffering can and should be eliminated.²² Dream justice appears to restore the status quo and an ideal world in which suffering is alleviated. However, the legal injury narrative cannot actually restore the plaintiff to his or her pre-injury condition, and rarely is the plaintiff's suffering totally alleviated. Regardless of this cold

¹⁹ This system has its own problems, see C M Flood, 'New Zealand's No-Fault Accident Compensation Scheme: Paradise or Panacea?' (1999/2000) 8 *Health Law Review* 3.

²⁰ Heilman, above n 4, 108.

²¹ Ibid 101.

²² Ibid 105.

reality, melodrama ‘cannot tolerate the discrepancy between the idea and the actual...it tries to obliterate the actual by tugging it relentlessly towards the ideal, and thus it leads to the severe tensions of reformism and coercion, and to the eventual shocks of disillusionment’.²³ This shock of disillusionment well describes the feeling of an injured plaintiff who, following her case and receipt of her compensatory damages, finds that she does not feel at all as though the accident did not occur. Her lawyer’s congratulations, society’s washing its hands of any further responsibility for her suffering, her sudden isolation after the withdrawal of support from others, frequently leaves a ‘successful’ plaintiff feeling less than the recipient of ‘dream justice’.

For the plaintiff, the story inevitably becomes one of tragedy. For it is a tragic structure in which the plaintiff ‘tries to live in a melodrama and comes to learn that he must live in a tragedy.’²⁴ Tragedy deals with an individual’s efforts to escape his or her destiny, and its conclusion is his or her reunion with destiny.²⁵ The personal injury plaintiff attempts through, and is encouraged by, the legal injury narrative, to return to his or her pre-injury condition and eliminate any suffering. However, frequently in the end, the cold hard cash provides little comfort and warmth for the plaintiff dealing with continuing incapacity and a lack of societal support.

Tragedy, on the other hand, does involve the suffering person finding a mode of recovery.²⁶ The tragic hero is not monopathic, is never simply a loser in a social conflict nor a simple victor over evil.²⁷ ‘Rather than affirming the social order, tragedy countenances its contradictions and explores the possibility that conflicts may be neither resolved nor mediated.’²⁸ While melodrama insists on total victory or defeat, tragedy ‘defines life as the paradoxical union of the two’.²⁹ The tragic narrative does not end with a total loss, rather something vital is saved.³⁰ ‘The ending is a symbol of something earned in the tragic action, in

²³ Ibid 115.

²⁴ Ibid 144.

²⁵ Ibid 154.

²⁶ Ibid.

²⁷ Ibid 156.

²⁸ Aristodemou, above n 11, 32.

²⁹ Heilman, above n 4, 154.

³⁰ Ibid 157.

contrast with the total sense of loss in dramas of despair and disaster'.³¹ In the tragic view of reality, 'man salvages, from the ruins of the present, the essential human powers on which continuity depends (a quite different thing from a melodramatic victory over an enemy). This may take place whether spiritual regeneration coexists with a new well-being in life...or man lives on in a paradoxical union of suffering and new wisdom...or comes to a new insight before dying...'³² '[T]o portray the dividedness of life is to encompass life in its wholeness. To see the diversity of claims and urgencies that divide humanity is to approach a total view, whereas to present man as if he were a unity, undivided, is incomplete'.³³ In any event, tragic narratives 'avoid easy classifications and facile resolutions' and go instead 'beyond good and evil'.³⁴

Narratives by injured people who have not, for one reason or another, entered into litigation for compensation, incorporate this kind of tragic resolution. For example, one young woman who was injured when she suffered serious scalding to her hand expressed delight at being able to show off her wounds to others at her school. She also pointed out that as a result of her accident, the type of kettles which caused her injury were replaced with a safer model, so some good came of it. A number of other injured people were quite pleased with their newfound celebrity status as a result of their injuries. One young man involved in a serious car accident in which a friend was killed explains how his spirituality and his family ties were strengthened during the time he was in hospital.

The contrast between the melodramatic legal injury narrative and the non-litigants' tragic narratives may go some way to explaining the latter's better health outcomes. Brody suggests that the healing process is optimal when 'the meaning of the illness experience is altered in a positive direction'.³⁵ This positive change requires that the injurious experience can be given acceptable meaning, given the injured person's existing belief system and that the injured person either feels personally powerful enough to affect the course of events for

³¹ Ibid 160.

³² Ibid 160.

³³ Ibid 16.

³⁴ Aristodemou, above n 11, 65.

³⁵ H Brody, *Stories of Sickness* (1987) 6.

the better or feels supported by a group of caring individuals who can compensate for his or her individual powerlessness.³⁶

In tragedy, choice leads to an opening of consciousness. Heilman suggests that a sound concept of tragedy may influence social well-being.³⁷ The tragic figure understands what he or she knows, wants and needs, and becomes aware of his or her impulses, imperatives and alternatives.³⁸ This language bears striking similarity to that of mediation. This seems to indicate that mediation has a role to play in improving the health outcomes for injured people by encouraging them to tell their injury story in a tragic genre.

9.6 Mediation as Tragedy

Mediation is 'a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.'³⁹ There are a number of aspects to this process that suggest that it may encourage an injured person to tell their story in a tragic genre, and thus lead to better health outcomes for that person than if they told their story according to the legal injury narrative in a litigious process.

In a mediation process, the injured person tells their own story in their own words. Thus, the procedure itself avoids the melodramatic text of muteness. In mediation the injured person is actively encouraged to speak. Dependence on others is not encouraged and the person is given an active role in the proceedings.

Mediation also focuses on the injured person's particular needs, with no overriding framework by which some needs are not valid or not relevant. In this way mediation can achieve very individualised justice. A participant in mediation will not be judged by any melodramatic stereotypes. Further, a

³⁶ Ibid.

³⁷ Heilman, above n 4, 4.

³⁸ Ibid 15.

³⁹ National Alternative Dispute Resolution Advisory Committee, Dispute Resolution Terms, September 2003, available at <http://www.nadrac.gov.au>.

person's inner conflicts and inconsistencies are recognised and acknowledged, but not condemned. This is supported by the private nature of mediation. The participants are the focus of the process and there is no requirement that one of the party's deservedness be recognised publically.

Mediation, unlike melodrama, is not about blame. Past actions and emotions are discussed, but the focus of the process is to find a means for all parties to move on into the future. Most importantly, mediation does not promote a fiction of restoration of status quo. Mediation provides a means by which the injured person is encouraged to think about how they will move forwards and what they need in order to do so in a positive way. Mediation is about generating options for the future, not simply a calculation of whether or not someone deserves compensation and if so, how much.

Mediation, unlike melodrama, does not result in total victory or total defeat. A resolution is usually a tragic one, involving a paradoxical union of the two. Although an injured person cannot walk away having been restored to the position he or she was in prior to the injury, they can hopefully walk away with a resolution that they can live with, and some practical options for making the best of their future. Mediation, like tragedy, aims for participants to learn something in the process: some communication skills, an identification of their own needs and concerns, a better understanding of the party with whom they are in conflict, and a recognition of the realistic options available for them in the future. In a sense, mediation aims at the tragic awareness that comes from salvaging the essential human powers on which continuity depends.

9.7 Further Enquiry

This thesis has revealed a number of areas in which further enquiry is needed. Empirical research in relation to the financial and health outcomes for different sorts of personal injury litigants would provide some insights into the difficulties that men, women and immigrants face in this kind of process. Australian data also needs to be collated to identify whether or not suggestions that male and female plaintiffs generally receive different amounts of compensation is supported by evidence. As mentioned earlier, Australian scholarship often refers to the discrepancy between the quantum of damages awarded to male and female

plaintiffs. This is, however, often simply assumed on the basis of one or two apparently unequal examples, rather than a comprehensive analysis of a trend across a large number of cases. Given the points made in this thesis about the differences in the ways female and male plaintiffs are portrayed in the legal injury narrative, it would not be surprising to find trends of different amounts of compensation. It would be interesting to see whether, if those differences exist, they are largely based on assumptions of gender differences in relation to economic loss, or whether they also include differences in relation to pain and suffering. If the latter, this may provide additional support for many of the arguments made in this thesis about gender stereotypes.

A study examining the psychological state of personal injury litigants before and after the resolution of their case would also provide valuable information about the effect of the process on litigants health outcomes. Finally, given the increasing use of mediation instead of litigation in some personal injury claims, a comparison of the health outcomes of injured people who have been involved in litigation and those who have resolved their claim by mediation could provide support for some of the suggestions made in the previous section.

9.8 Conclusion

There is no doubt that the litigation process has some positive aspects for the injured person. Commentators have referred to the importance of having the opportunity to speak and be heard about personal trauma, calling to account those who have injured them, obtaining information about what happened, receiving independent validation of suffering, being satisfied by punishing the injurer and receiving the financial benefits of a successful action.⁴⁰ However, although telling a story of pain and suffering can be cathartic, telling it in the form of a victim story risks reducing oneself to stereotypes of invalidity. Further, in the current system, the injured person does not have the opportunity to tell their own story or to be heard on their own terms. They are only able to have their story told by, or at least under the direction of, authoritative others in

⁴⁰ P A Bell, 'Analyzing Tort Law: The Flawed Promise of Neocontract' (1990) 74 *Minnesota Law Review* 1177, 1218. Note also Steven Smith's article about tort as a system of dispute resolution arising from perceived breaches of important social norms, thereby reducing conflict and reaffirming those norms: S D Smith, 'The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law' (1987) 72 *Cornell Law Review* 765.

accordance with the legal injury narrative framework. Litigants are thus disempowered, unlike participants in mediation who, in general, have increased control over and satisfaction with the process. Although a melodramatic narrative, such as the legal injury narrative, may provide catharsis and dream justice from society's perspective, from the individual plaintiff's point of view the story is less likely to result in a positive long-term outcome. For the plaintiff is likely to find that, contrary to their expectations, a 'win' is anti-climatic. For him or her, at the end of the narrative, the status quo has not actually been restored. They are not back in the position they were in prior to the injury occurring, and in many ways they have been denied the opportunity to learn and develop the skills necessary to cope with this discord. Their support systems, upon which they have become necessarily dependent, suddenly disappear. Accordingly, for many personal injury plaintiffs, at this point they either succumb to melodramatic despair, or have to start the painful process of rewriting their story according to the tragic genre, allowing them some kind of healing and to move towards the future instead of looking back at the past.

Appendix 1 : Stark Contrast Between Pre- and Post- Injury State

The following extracts are taken from various Australian personal injury cases. They are all representative of the legal injury narrative requirement that the plaintiff demonstrate a stark contrast between the pre- and post-injury state.

Prior to the accident the plaintiff led a very active life. He was an excellent and enthusiastic sportsman. He had a wide circle of friends, was confident and enjoyed life. He did all the housework (except ironing) and garden maintenance around the house. I accept that the plaintiff is no longer able to participate in competitive sport nor carry out the housework and maintenance around the house and garden to the extent he did before the accident. He can drive a motor vehicle. While he still has a circle of friends, goes to the movies and has a social life, the quality of his social life has diminished and he finds it less satisfying.¹

The injuries the plaintiff suffered as a result of the accident had a very profound effect on the plaintiff's lifestyle. He has gone from an independent young man who enjoyed life to becoming almost a recluse.²

The plaintiff is significantly disadvantaged by this level of disability. He is unable to engage in the physical recreational activities which he previously enjoyed. He, of course, finds working and maintaining employment a much more onerous task than previously and as I have mentioned he has difficulty with interpersonal relationships.³

It was submitted that before the accident, the plaintiff was 35 years of age, a single man who engaged successfully in a number of relationships, who led a very active life with a number of outside interests, in particular out in the bush. He had a busy social life and for some two and a half years had been running his

¹ *Black v Road Transport Authority of New South Wales* [2000] NSWSC 326.

² *Van-Der Sluice v Display Craft Pty Ltd* [2000] NSWSC 1174.

³ *Lawson v Lawson & Ors* [2000] QLDSC 134.

own business and was a young man who was very fit and healthy. The accident had had a profound and permanent effect on his life.⁴

⁴ *Hartley v Pongraz* [1999] VSC 125.

Appendix 2 : Improvements Followed by Negative

The following extracts are taken from various Australian personal injury cases. They are all representative of the legal injury narrative requirement that the plaintiff demonstrate extreme suffering. They are examples of how any factors that might moderate the extremeness of a plaintiff's suffering are downplayed, or immediately followed by a negative aspect.

There was slight improvement but she was still suffering severe pain.¹

He is still able to perform most activities of daily living and domestic tasks, but has to be careful and avoid heavy lifting. He can still drive. He has however given up some recreations, such as running.²

I am satisfied that he could still perform his tailoring duties with the restrictions described by his medico legal specialist.³

Towards the end of the year he was back to working full hours, although he avoided the heavier tasks such as lifting sacks of mail from the dock area at the mail exchange.⁴

The second operation achieved some improvement but it was not until some two years later that the plaintiff ceased to be affected by what he called 'pain in static circumstances'. However, use of the wrist even for relatively minor tasks continues to bring on pain which can last for as much as a couple of days.⁵

The plaintiff says that she took some weeks off work, and then returned to work, but says that she was in neck pain, and found the work hard. She says that she became cranky with pain, and worked reduced hours. Her then employer gave evidence of a change in her demeanor around this time.⁶

¹ *Linda Ann Sheffield v Woolworths Ltd* [1999] ACTSC 46.

² *Nguyen v Bucis* [1999] ACTSC 84.

³ *Ibid.*

⁴ *Rifai v Chan* [1999] ACTSC 117.

⁵ *Hunter Garth Lonsdale v Ian Smith* [2000] ACTSC 15.

⁶ *Umback v Wallace & Anor, Umback v Kelly* [1999] ACTSC 113.

I am satisfied that, as he has been able to move to a new career which puts considerably less stress on his back his depression has improved, and will continue to do so, but it was apparent in his evidence that he is still somewhat distressed at what has happened in the last few years. I am satisfied that he still has pain, but that it is not present all the time, and that he still sometimes takes panadol forte.⁷

The plaintiff was off work for two weeks, then returned to work on graduated duties, but was back to flying after a month or so. She said that the neck and back pain was 'bearable' but she had some difficulties with moving trolleys and lifting bags.⁸

He acknowledged that he still can do some housework, but not as much as he did before the accident, when his wife worked long hours and he would prepare meals and do housework when he returned from work in the mid afternoon.⁹

The plaintiff sustained lacerations to her forehead and abrasions and bruising across her body in the accident, which have resolved, but continues to complain of neck and back pain, and has required extensive use of painkillers in the years since the accident.¹⁰

The diaries confirm that as well as these normal activities the plaintiff has from time to time engaged in some maintenance activities on two investment properties. The plaintiff acknowledged this, but said that he suffered pain in the process.¹¹

His counsel acknowledges that he has now made a good recovery, save only for a concern about heavy lifting.¹²

I note that while he has recovered from many of his injuries and is able to get about and indeed spend some time in his garden and at building sites, he still is restricted in his movements and activity, and in his recreational pursuits, particularly.¹³

⁷ *Dryden v Hopkins* [1999] ACTSC 126.

⁸ *Louise Margot Heath Thompson v Patrick Evanoss* [2000] ACTSC 73.

⁹ *Jose Miranda v Skatebin Formwork Pty Ltd* [2000] ACTSC.

¹⁰ *Joanne Maree Mitchell v Mathew Barham* [2000] ACTSC 88.

¹¹ *Gregory Hackett v Enid Rochow* [2000] ACTSC 96.

¹² *Carman v Smithfield Tavern FNQ Pty Ltd* [2000] ACTSC 11.

¹³ *Koznjak v Andreco-Hirll Refractory Services Pty Ltd & Anor* [2000] ACTSC 10.

He thereafter regained the use of his arm, but was worried about further injury.¹⁴

I am satisfied that the symptoms of the injury had by this time effectively resolved, but I accept that the disc pathology as revealed in the October 1998 MRI was caused by the accident and has rendered the plaintiff more susceptible to future trauma.¹⁵

...any improvement has now occurred and indeed the plaintiff does acknowledge that there has been some improvement since the accident, but that the existence of a smile which is asymmetrical will now be permanent.¹⁶

The plaintiff's current complaints are that he has a great neck provided he does not use it too much. Nodding his head causes pain and he cannot swivel his head around to talk to students.¹⁷

He can drive a motor vehicle. While he still has a circle of friends, goes to the movies and has a social life, the quality of his social life has diminished and he finds it less satisfying.¹⁸

The plaintiff still has a couple of loyal friends but not as many as he did prior to the accident. At the Christmas party for the music company, the plaintiff took photographs but only a few were of a standard that could be reproduced in the magazine.¹⁹

At trial he was bowling twice a week, but the range of movement diminished as the game progressed. His average score has been gradually coming down. Similarly with golf, his shoulder 'locking' as the game progressed causing deterioration in his standard of play. He gave examples of loss of social contact at golf because other players apparently preferred not to play with a person of his low standard. His handicap has gone out to the maximum available.²⁰

He was then working as a barman and could fulfill his duties, although he had some pain in his lower back radiating into his right leg at the end of the day.²¹

¹⁴ *Future Look Landscaping Pty Ltd v Hanlon* [1998] NSWSC 40658.

¹⁵ *Vindya Shirley Thevar v Deborah Docherty* [2000] ACTSC 42.

¹⁶ *Angela Pozgay v E J O'Connor & Sons and Brian O'Connor* [2000] ACTSC 59.

¹⁷ *Wilke v Astra Pharmaceuticals Pty Ltd & Anor* [1999] NSWSC 1047.

¹⁸ *Black v Road Transport Authority of New South Wales* [2000] NSWSC 326.

¹⁹ *Van-Der Sluice v Display Craft Pty Ltd* [2000] NSWSC 1174.

²⁰ *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628.

²¹ *Kliese v Pelling* [1998] QLDSC No. 1113 of 1987.

Since at least the beginning of 1994, however, the plaintiff has been capable of carrying out light work of the kind involved in his Bumpa T Bumpa job. Yet his constant low back pain and its psychological consequences reduced his prospects of obtaining employment; other things being equal, employers would have preferred applicants without his limitations.²²

He will be prone to periods of serious depression which, it is true, can be dealt with by appropriate treatment, but his personality profile is such that he seems destined to suffer significantly because of his injuries.²³

He felt encouraged that he would recover his health since the pain abated when he rested. When he attempted to carry out more strenuous activities helping on the property, for example chopping firewood, he experienced pain...He has been able to ride his motorcycle for some longish journeys but this has resulted in significant pain...He has embarked upon knife-making, without commercial success, and more recently, making country style outdoor furniture which appears to be very much a slow hobby type activity which gives him some remuneration. He is hampered in all of these attempts at self employment by his need to rest as well as by being dispirited at his lack of progress.²⁴

Long-haul truck driving has its own physical demands which the plaintiff at present is prepared to meet. This may not be so easy to achieve with advancing years.²⁵

I believe his relationship with his employer will improve and he will exercise his earning capacity as much as he is able. I think he will have continuing difficulties, however, with social relations and he has lost for all time the chance to enjoy any active sport.²⁶

Mr Wade suffered a head injury which appears not to have had major consequences although neuropsychological testing did note changes consistent with head injury. However, Mr Wade has maintained his intelligence, skills and is able to pursue his career. Even daily activities in the maintenance of his independence are stressful and to date Mr Wade has avoided seeking too much

²² *Ronkovich v Eveans & Ors* [1998] QLDSC 6290.

²³ *Scarf v State of Queensland and Anor* [1998] QLDSC 1272.

²⁴ *Maynard v Rover Mowers Ltd* [1999] QLDSC 4509.

²⁵ *Lawson v Lawson & Ors* [2000] QSC 134.

²⁶ *Mosley v The Broken Hill Proprietary Co Ltd* [1998] SASC 6522.

help to run his life. What has happened has been a major blow to his self-image.²⁷

He still sees male friends and he drives a car. He has recently started going fishing on a punt fitted with a special seat. His friends launch the boat for him. However, generally, his social life is considerably diminished.²⁸

It is true that Mr McCallion has the skill to read drawings, to operate forklifts and cranes, and to work in the buying section of an organisation. These attributes, however, will not necessarily (or even probably) be marketable when inseparably connected with a back which does not allow Mr McCallion to sit comfortably for long in the best possible circumstances, or at all in many others.²⁹

There has been some improvement in the plaintiff's social situation over the last 12 to 18 months, and it should not be said that her social life has been non-existent since the accident; but overall the impact of the accident upon the plaintiff up to the present time has been quite severe.³⁰

²⁷ *Wade v Australian Railway Historical Society (South Australian Division)* [1999] SASC 311.

²⁸ *Hartley v Pongraz* [1999] VSC 125.

²⁹ *McCallion v U R Machinery Sales Pty Ltd* [1999] VSC 543.

³⁰ *Woods v Ross* [2000] VSC 501.

Appendix 3 : Doctor Restating Plaintiff's Reports of Pain

The following extracts are taken from various Australian personal injury cases. They show how the evidence of medical experts is often simply a restatement of the plaintiff's own communication of pain to the doctor.

She noted some back pain.¹

She raised the matter of low back pain as well as the usual symptoms.²

Dr Knox thought that she displayed genuine pain in the back.³

Dr Danta also took a history of ... increase in neck pain...⁴

Dr Chandran ... reported that the plaintiff reported being 'half dead with the pain, unable to cope with activities at home'.⁵

In a report of August 1997 Dr Andrews had noted that the plaintiff complained of fairly chronic pain in the cervical region with associated headaches, and he found tenderness on examination.⁶

Dr Keller noted ongoing lower back pain from the disc injury.⁷

Dr Ong...found that he was tender in the lumbar sacral region. Flexion and extension of his lumbar spine was painful and restricted. He had no pain on rotation...⁸

...continues to present with chronic mechanical central low back pain of mild to moderate severity...⁹

¹ *Risteska v The Commonwealth of Australia* [1999] ACTSC 56 at 389-400

² *Ibid* at 407-413

³ *Ibid* at 537-542

⁴ *Zorzi v Robbins* [1999] ACTSC 72 at 279-281

⁵ *Dass v Rifai & Anor* [1999] ACTSC 67 at 158

⁶ *Blazeski v City Group Cleaning Contractors* [1999] ACTSC 69 at 178-181

⁷ *Ibid* at 199

⁸ *Nguyen v Bucis* [1999] ACTSC 84 at 88-90

⁹ *Ibid* at 153-154

...reports complaints of pain at the left neck and shoulder....On her next visit Dr Jamieson recorded intermittent pain over the right neck and low back pain post the accident.¹⁰

¹⁰ *Umback v Wallace & Anor, Umback v Kelly* [1999] ACTSC 113 (29 October 1999) at 142-145

Appendix 4 : Doctor Describes Likely Pain

The following extracts are taken from various Australian personal injury cases. They show how medical experts often give evidence about pain based on normative standards, rather than on the plaintiff's subjective and reported pain.

By and large symptoms tend to improve with time, but often pain lasts for a number of years.¹

Since there had been no improvement in the neck so far, I feel that the prognosis is poor and she is likely to continue with her pain for a number of years.²

Once painful, such changes tend to remain so to some degree, and sometimes to become increasingly painful with time if the degenerative changes progress...On balance, I think it unlikely he will develop more severe pain...³

He is no doubt getting some pain in his back...⁴

¹ *Risteska v The Commonwealth of Australia* [1999]ACTSC 56 at 266-268

² *Ibid* at 272-274

³ *Nguyen v Bucis* [1999] ACTSC 84 at 130-139, 143-147

⁴ *Ibid* at 176-179

Appendix 5 : Civil Liability Law Reforms

Introduction

In July 2002 the Australian Federal Government released Terms of Reference for a Review of the Law of Negligence in Australia. A Panel of Experts was appointed to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death. This was seen to be necessary as awards of damages for personal injury had ‘become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another’.¹

The Panel released its final report (known as the ‘Ipp Report’) in September 2002. The Panel recommended that a statute be enacted in each Australian jurisdiction modifying the law relating to any claim for damages for personal injury or death. The recommended civil liability reforms have been put into effect by various legislation enacted in most Australian States and Territories.²

The civil liability legislation does not purport to codify the law relating to civil claims for damages for harm³, nor does it cover civil liability that comes under the various Motor Accidents, Workers’ Compensation and Criminal Injuries legislative regimes.⁴

The reforms proposed in the Ipp Report and enacted in the civil liability legislation do not alter the fundamental bases of actions for personal injuries. The Panel’s Terms of Reference focused on limiting liability and quantum of damages – in other words, limiting the exposure of defendants to actions for

¹ Terms of Reference, D A Ipp, *Final Report of the Review of the Law of Negligence* (2002) ix.

² Including: *Civil Liability Act* 2002 (NSW), *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW), *Personal Injuries (Liabilities and Damages) Act* 2003 (NT), *Personal Injuries Proceedings Act* 2002 (Qld), *Civil Liability Act* 2002 (WA), *Civil Liability Act* 2003 (Qld), *Civil Liability Act* 2002 (Tas), *Trade Practices (Liability for Recreational Services) Act* 2002 (Cth), *Civil Law (Wrongs) Act* 2002 (ACT), *Wrongs (Liability and Damages for Personal Injury) Amendment Act* 2002 (SA), *Recreational Services (Limitation of Liability) Act* 2002 (SA), *Wrongs and Other Acts (Public Liability Insurance Reform) Act* 2002 (Vic).

³ Section 3A(5) *Civil Liability Act* 2002 (Tas).

⁴ Section 3B *Civil Liability Act* 2002 (Tas).

damages arising from personal injury and death. The subsequent reforms are therefore not concerned in any way with improving the experience of, or outcomes for, the injured people potentially involved in these actions, nor are they aimed at improving safety and careful behaviour of those who may put others at risk. They are simply an attempt to limit the economic impact of injury litigation.

Subsequent to the reforms, personal injury actions are still adversarial, liability is still based on fault, and damages are still premised on the notion of compensating the plaintiff for harm suffered. Accordingly, to a large extent, the reforms have little impact on my concept of the legal injury narrative. In fact, in many instances, the reforms appear to have the potential to reinforce or exacerbate existing problems inherent in the legal injury narrative, for example, the need for the plaintiff to demonstrate virtue in order to deserve to have her suffering alleviated. The effect of the reforms on particular aspects of the legal injury narrative is discussed in the following sections.

Moral Polarization

The civil liability reforms reinforce the moral polarization of the plaintiff and the defendant. The reforms maintain the necessity for the defendant to be portrayed as a villain, and even make it easier to prove liability when the defendant has been particularly bad. The reforms also prevent plaintiffs who can be portrayed as bad from recovering damages for personal injury, irrespective of the fact that these injuries may have been caused by a negligent defendant.

Even where the legislation significantly limits liability with respect to certain defendants (such as public authorities) it makes exceptions where the defendant fits the stereotype of the ‘villain’. For example, a public authority is not entitled to rely on a risk warning where the authority has acted ‘with reckless disregard for the consequences’.⁵ A public authority which acts unreasonably outside its authority can also not rely on protection from liability when its acts give rise to injury.⁶

The legislation also makes allowances for defendants to avoid liability where they are somehow acting as ‘virtuous characters’ and so it appears morally

⁵ Section 39(11) *Civil Liability Act 2002* (Tas).

⁶ Section 40(2) *Civil Liability Act 2002* (Tas).

confusing to hold them liable. The legislation provides that the defendant's breach of duty must have been a necessary element of the occurrence of harm, and also that it must be appropriate for the particular defendant's liability to extend to that harm.⁷ This 'scope of liability' requirement seems to allow a defendant who does not fit the role of villain (for example, because they are doing something of benefit to society such as driving an ambulance or acting as a rescuer) to avoid liability. The legislation also provides specific exemptions from liability for a public authority properly exercising its functions⁸ and individuals engaged in community work.⁹

It is particularly interesting to note that where someone engaged in community work is doing so under an order imposed by the court (for example, community service as a sanction for criminal activity), they are not protected as a volunteer.¹⁰ This again reinforces the notion that only those people seen as 'good' will be protected. The same exception applies with respect to volunteers who are acting outside the scope of the community work, contrary to instructions, or under the influence of drugs or alcohol.¹¹ The legislation provides that those volunteers who have not taken the drugs voluntarily or for therapeutic purposes, will not lose the protection of the legislation.¹² This again reinforces the difference in the way the law applies depending on whether you are a 'good' or 'bad' drug user.

One particularly interesting exception to the general principle that 'good' volunteers will be protected from liability involves personal injury caused by a motor accident. The legislation provides that where there is a valid third party insurance policy covering the volunteer, they are able to be sued for damages.¹³ In a sense, this provision means that the volunteer will be protected by the insurance, so does not need additional protection from the legislation.

⁷ Section 13(1)(b) *Civil Liability Act 2002* (Tas).

⁸ Section 40 *Civil Liability Act 2002* (Tas).

⁹ Section 47 *Civil Liability Act 2002* (Tas).

¹⁰ Section 45(3) *Civil Liability Act 2002* (Tas).

¹¹ Section 47(3) *Civil Liability Act 2002* (Tas).

¹² Section 47(4) *Civil Liability Act 2002* (Tas).

¹³ Section 47(2) *Civil Liability Act 2002* (Tas).

The Virtuous Plaintiff

The reforms also reinforce the fact that a plaintiff must be virtuous in order to deserve compensation for his or her suffering. Particular examples include the provisions relating to presumptions of contributory negligence where the injured person was intoxicated at the time of the accident¹⁴, and those limiting recovery of damages by criminals¹⁵.

The legislation provides that a plaintiff who was intoxicated at the time of injury can only be awarded damages if it can be shown that the accident giving rise to the injury would have likely occurred even if the plaintiff had not been intoxicated at the time. However, even if that likelihood is accepted, there is a presumption of contributory negligence (reducing any award of damages by at least 25%) unless the plaintiff can demonstrate that intoxication did not contribute in any way.

However, the passivity of the plaintiff as an indicator of virtue is reinforced by the proviso that intoxication will not give rise to contributory negligence where it was not self-induced.¹⁶ Similarly, as mentioned earlier, volunteers who have not taken drugs voluntarily or who take them for therapeutic purposes (presumably in passive compliance with the advice of a recognised authority figure – a medical doctor), will not lose the protection of the legislation.¹⁷

The legislation also prevents a person from taking action for compensation for personal injury if they were, at the time of the incident that resulted in the injury, engaged in conduct that constitutes (on the balance of probabilities) a serious offence, and that conduct contributed materially to the risk of death, injury or damage. It is interesting to note that this section operates whether or not a person whose conduct is alleged to constitute an offence has been, will be or is capable of being proceeded against or convicted of any offence concerned, and restricts the right of recovery based on criminal conduct proved only on the balance of probabilities.

The provisions relating to recovery by criminals are particularly concerning. In effect, the legislation prevents a person from receiving damages for their injuries

¹⁴ Section 5 *Civil Liability Act 2002* (Tas).

¹⁵ Section 6 *Civil Liability Act 2002* (Tas).

¹⁶ Section 5(4) *Civil Liability Act 2002* (Tas).

¹⁷ Section 47(4) *Civil Liability Act 2002* (Tas).

if they were engaged in criminal activity at the time of injury. This decision is made on the balance of probabilities, rather than on the criminal standard (beyond reasonable doubt), and has effect whether or not the person ‘will be or is capable of being convicted of any offence relating to the conduct’.¹⁸ Under the existing common law, where a plaintiff’s conduct contributes materially to the risk of death, injury or damage that was suffered, the plaintiff’s damages are reduced on the basis of that contribution. However, this provision has the effect that the plaintiff engaged in criminal activity (decided on the lower civil standard of proof) loses all right to any damages, regardless of the fact that the defendant in question may have been grossly negligent and that this might have also been instrumental in the plaintiff suffering injury. In a sense, this provision clearly has the effect that unvirtuous plaintiffs, such as those who can be categorised as criminals, are not deserving of compensation.

Melodramatic Blame

The civil liability reforms do not alter the fundamental aim of the legal injury narrative – to reinstate the status quo. The reforms are clearly based on the melodramatic notion of individualised blame, privileging public authorities (who are frequently provided with protection from liability¹⁹) over private individuals whose actions might cause injury. Attention is still diverted from broader social factors that contribute to harm and suffering. In fact, in some aspects the reforms specifically prohibit criticism of existing social structures. For example, Section 38 of the *Civil Liability Act* 2002 (Tas) deals with the liability of public or other authorities and provides that whether or not an authority owes a duty, or has breached that duty, depends on the authority’s financial and other resources, and that ‘the reasonableness of the allocation of those resources is not open to challenge’. Blaming is also still dichotomised. The *Civil Liability Act* simply redistributes some of the blame from the defendant and lays it back on the plaintiff.²⁰ This is consistent with the underlying policy of the reforms: to encourage potential plaintiffs to take more responsibility for themselves.

However, legislation such as the *Civil Liability Act* 2002 (Tas) has varied the common law to a certain extent. The legislation limits liability where a person is

¹⁸ Section 6(2) *Civil Liability Act* 2002 (Tas).

¹⁹ For example Section 42 *Civil Liability Act* 2002 (Tas).

²⁰ For example, Section 20 *Civil Liability Act* 2002 (Tas).

injured due to an 'obvious risk'. The term 'obvious risk' is defined as 'a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person'.²¹ Section 16 provides that where a defendant raises the defence of voluntary assumption of risk and the risk in question is an obvious one, the plaintiff is taken to be aware of the risk unless the plaintiff can prove, on the balance of probabilities, that he or she was not aware of the existence of the risk. There is also generally no duty to warn of obvious risks. The legislation also provides specifically for situations in which a plaintiff is injured while engaging in dangerous recreational activities. A defendant will not be liable for a breach of duty for harm suffered as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff, whether or not the plaintiff was aware of the risk.²²

²¹ Section 15(1) *Civil Liability Act 2002* (Tas).

²² Section 20 *Civil Liability Act 2002* (Tas).

Appendix 6 : Candidate's Publications Relevant to Thesis

HARDY, S. (2004) Chapter 7: "Injury as Melodrama" in Andrew T Kenyon and Peter D Rush (eds), *An Aesthetics of Law and Culture: Texts, Images, Screens* (Elsevier: New York) ISBN 0 7623 1151 7, 155-177.

HARDY, S. (2005) "Legal Melodramas of Injury and Gender". *Journal of Interdisciplinary Gender Studies*, 9(2): 23-40.

List of Cases and Statutes

CASES

- Acosta v Chegwin* (1998) NSW SC CA 40011/97
- Alford v Magee* (1951-2) 85 CLR 437
- Allen v NSW Fire Brigade* [2000] NSWSC 276
- Angela Pozgay v E J O'Connor & Sons and Brian O'Connor* [2000] ACTSC 59
- Angelo Cerullo v Adam Gilrain & Ouy Tang Jong* [2000] ACTSC 64
- Artur Fatur v IC Formwork Services Pty Ltd and Civil and Civic Pty Ltd* [2000] ACTSC 14
- Attorney General v Eichmann* (1961) Criminal Case 40/61 (Jerusalem)
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